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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-476

ARLAM CARR, JR., *et al.*,

and

PENELOPE ANNE JENKINS, *et al.*,

Petitioners,

vs.

MONTGOMERY COUNTY BOARD OF EDUCATION, *et al.*

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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Opinion dated May 22, 1974

ARLAM CARR, JR., *et al.*,

Plaintiffs,

NATIONAL EDUCATION ASSOCIATION, INC., AND PENELOPE ANNE JENKINS, *et al.*,

Plaintiff-Intervenors,

UNITED STATES OF AMERICA,
AMICUS CURIAE,

v.

MONTGOMERY COUNTY BOARD OF EDUCATION, *et al.*,

Defendants.

Civ. A. No. 2072-N.

United States District Court,
M. D. Alabama, N. D.

May 22, 1974.

OPINION

JOHNSON, Chief Judge.

This school desegregation case, having been previously before this Court and the appellate courts upon several occasions, is again submitted. The present submission is upon the pleadings, the evidence presented orally over a period of several days, and the briefs and arguments of the parties. Upon this submission this Court now makes appropriate findings of fact and conclusions of law. As authorized by Rule 52, Federal Rules of Civil Procedure, these findings and conclusions are incorporated in this memorandum opinion.

Opinion dated May 22, 1974

I. History of Case

This case was originally filed in May, 1964, when a group of black children and their parents, with the United States participating as *amicus curiae*, asked this Court to enjoin the Montgomery County Board of Education from "continuing the policy, practice, custom, and usage of maintaining and operating a compulsory biracial school system."[1] Although ten years had passed since the Supreme Court's decision in Brown v. Board of Education,[2] the schools of Montgomery County, as was true in many areas of the United States, were completely segregated; one set of schools was operated exclusively for white students and staffed entirely by white teachers, and one set was operated for black students and staffed by black teachers. Thus, on July 31, 1964, this Court declared that the Montgomery schools were being operated in violation of the law of the United States and enjoined defendants from continuing to operate these schools on a racially segregated basis.[3] But this Court fully "realized that desegregation of the public schools cut across the social fabric of this community and that there were both administrative and other practical problems for the board to cope with in order to comply with the law."[4] Consequently, the board was allowed to proceed with desegregation in a gradual manner. A freedom-of-choice plan pro-

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[1] Carr v. Montgomery County Board of Education, 232 F.Supp. 705 (M.D.Ala. 1964).

[2] 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

[3] At the time this Court entered its order in July, 1964, there were approximately 25,000 white students and 15,000 black students attending the Montgomery County school system.

[4] 289 F.Supp. at 657.

posed by the board as the means for integrating four grades was accepted.

Almost two years later, on March 22, 1966, this Court ordered that the freedom-of-choice plan be implemented in 10 of the 12 grades for the 1966-67 school year and that the plan be fully operative throughout the system commencing with the fall of 1967.[5] In addition, this Court decreed that:

> Race or color will henceforth not be a factor in hiring, assignment, reassignment, promotion, demotion, or dismissal of teachers and other professional staff, with the exception that assignments shall be made in order to eliminate the effects of past discrimination.[6]

On August 17, 1967, and February 7, 1968, the United States requested this Court to require defendants to take further steps to disestablish the dual school system in Montgomery County. Upon review of the record, this Court found that the school board had failed to discharge its affirmative duty to eliminate the dual school system.[7]

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[5] Carr v. Montgomery County Board of Education, 253 F.Supp. 306 (M.D.Ala. 1966).

[6] *Id.* at 310. This decree originally required the process of desegregating the faculty and professional staffs to commence with the school year 1966-67. But when the Fifth Circuit subsequently allowed the Mobile County system until the school year 1967-68 to end its policy of hiring and assigning teachers and staff by race, this Court, on its own motion, modified the March 22 order to give the Montgomery board an additional year before requiring desegregation of the system's faculty and staff. Again, this Court was cognizant of the administrative problems and practical ramifications of its order, and thus sought to give the board some additional time in which to meet its constitutional obligation to desegregate Montgomery's dual school system.

[7] Carr v. Montgomery County Board of Education, 289 F.Supp. 647 (M.D.Ala. 1968).

Under the freedom-of-choice plan, only 550 blacks were attending traditionally white schools. No white children were attending traditionally black schools. Of the approximately 550 black teachers and 815 white teachers, only 32 were teaching in schools that were predominantly of the opposite race.

On the basis of this evidence, it was found necessary to establish specific requirements governing minimum amounts of progress in future desegregation efforts. First, this Court ordered that the board must move toward a goal under which the ratio of white to black faculty members in each school was substantially the same as it was throughout the system.

Second, the school board was required to obtain approval from the State Superintendent of Education prior to the construction of any new school or any additions to existing schools.

Third, the board was ordered to eliminate race as a factor in the assignment of students to school buses and in its designation of bus routes. Finally, this Court observed that the board's freedom-of-choice plan was not working and that unless the plan became more effective in eliminating the dual school system, the Court would have no alternative except to order some other plan.[8]

For the first time in this case, defendants appealed this Court's order.[9] On appeal, the Fifth Circuit affirmed the

[8] In its supplemental order granting partial stay of the order pending appeal, this Court observed that the board had attempted to operate part of the Montgomery system under the freedom-of-choice plan and part under the neighborhood school plan. Under this scheme, the board sought to perpetuate a series of segregated schools in exclusively white neighborhoods. Needless to say, this Court found this to be an egregious violation of the board's affirmative duty to establish a unitary school system.

[9] This fact is significant in that it underscores the efforts of the Montgomery board to comply with the law as reflected by the

March 2, 1968, order.[10] A petition for rehearing *en banc* was denied by the Fifth Circuit.[11] Finally, the Supreme Court granted *certiorari* and also affirmed this Court's order.[12]

In the summer of 1969, plaintiffs and the United States again filed motions asking this Court to require the board to take additional steps to disestablish Montgomery's dual school system.

An evidentiary hearing was held on February 24, 1970, to consider plans submitted by the United States and the board. The board's plan essentially adopted the basic elements of the plan proposed by the government experts

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mandates of this Court. Unlike many school boards that opposed desegregation at every step, the Montgomery County Board of Education recognized that it had an affirmative duty to desegregate its school system. As the Fifth Circuit noted on appeal, "good faith conduct on the part of any litigant in any court, especially in a court of equity and, more particularly, in the sensitive area of desegregation, is a vital element for appropriate consideration." 400 F.2d 1, 2 (5th Cir. 1968).

Although the board contended that this Court's order was unprecedented in its imposition of "ratio" requirements, this Court was firmly convinced that its order was "the *minimum* the applicable law will allow under the peculiar facts and circumstances presented and that each and every feature of the order and injunction entered in this case on February 24, 1968, is not only authorized but *required* by the applicable law." 289 F.Supp. at 660 (emphasis added).

[10] 400 F.2d 1, 8 (5th Cir. 1968).

[11] 402 F.2d 782 (5th Cir. 1968).

[12] United States v. Montgomery County Board of Education, 395 U.S. 225, 89 S.Ct. 1670, 23 L.Ed.2d 263 (1969). The Supreme Court concluded its opinion by noting that "it is good to be able to decide a case with the feelings we have about this one. The differences between the parties are exceedingly narrow." *Id.* at 236.

with some minor changes and refinements.[13] Under the board's projections for the 1970-71 school year, this plan provided that there would be no all-white schools in the county and only one all-black school. Over plaintiffs' objections that this plan did not go far enough in eliminating the dual school system, this Court approved the board's plan with some modifications of its own.[14] On appeal, the Fifth Circuit affirmed this Court's decision to implement the board's plan.[15] The Fifth Circuit added the following cautionary note:

> Once a school board has acted, however, the courts have a solemn obligation to determine whether the structure designed by the school board will house a unitary school system. This obligation is unremitting, and there can be no abdication, no matter how temporary. Accordingly, any imprimatur of judicial approval must be entered with the caveat that until construction of a unitary system is completed, change orders, when appropriate, will be issued to ensure that the designed structure in fact accommodates a unitary system and not a bifurcated one.[16]

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[13] This plan included proposals to close certain schools in the system, to pair several rural schools, to adopt neighborhood zoning of the schools within the city of Montgomery, and to transport students from non-zoned rural areas to schools within the city.

[14] In its order, this Court made clear that the law does not require racial balance or similar student ratios throughout a school system. "Complete disestablishment of the dual school system to the extent that it is based upon race is required."

[15] 429 F.2d 382 (5th Cir. 1970). In addition, the Circuit Court directed that the majority-to-minority transfer provisions of the plan be altered to reflect a change in the law since this Court's order of February 25, 1970.

[16] 429 F.2d at 386.

Since this Court's order of February 25, 1970, the board's plan has remained largely unaltered. The board has worked with plaintiffs and the United States in an effort to keep its plan updated, and changes in attendance zones and school facilities have been proposed and approved by this Court. But changes in the facts of this case—largely changes in residential patterns—and recent clarifications by the Fifth Circuit and the Supreme Court of the obligation of a school board to establish a unitary school system now necessitate an overall evaluation of this system's compliance with the requirements of the law. Accordingly, on August 29, 1973, all parties were ordered to submit their suggestions and proposals for the further desegregation of the Montgomery system.

It is important at this point to emphasize two factors that have characterized this continuing litigation. First, this Court has often recognized the practical problems and administrative difficulties in eliminating a dual school system that had been closely tied to long-established social patterns.[17] A successful school system demands support from the community—both black and white. To facilitate this support, this Court has attempted to avoid imposing rigid or inflexible requirements on the board and, where possible, has allowed the parties to work out their own differences. In this way, this Court has constantly strived for a workable solution to the problems encountered in converting from a dual system to a "unitary system in which racial discrimination would be eliminated root and branch."

Second, all the parties to this litigation share the same goal: establishment of a "desegretated, unitary and nonra-

[17] See, *e.g.*, 289 F.Supp. at 657. See also note 6, *supra*.

cial school system." [18] Every court that has reviewed the record of this litigation has observed that the differences between the parties have been unusually small.[19] Moreover, the Montgomery County School Board has been repeatedly complimented for its good faith efforts to comply with the requirements of the law.[20] It is worthy of pride that the ten-year history of this case has been characterized throughout by cooperation from all the participants.

II. An Analysis of the Plans Before the Court

A number of desegregation proposals have been submitted for the Court's consideration. In evaluating these proposals, it is important to keep in mind that the real controversy now presented centers around the operation of the elementary schools.

On January 15, 1974, the defendant board submitted its initial proposal, and the United States submitted a number of detailed suggestions. On February 14, 1974, the United

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[18] Brief for the board before the Supreme Court. See 395 U.S. 225, 236, 89 S.Ct. 1670, 23 L.Ed.2d 263 (1968).

[19] 395 U.S. at 236. See note 12, *supra*. 400 F.2d at 2; 429 F.2d at 386-387.

[20] This Court has often complimented the board on its performance of its constitutional obligation to desegregate the Montgomery schools. See 400 F.2d at 3 n. 3. Appellate courts, upon the review of this record, have similarly expressed their approval of the board's good faith efforts throughout these proceedings. See 395 U.S. at 230, 236; 400 F.2d at 2-3. An example of this approval by the Fifth Circuit: "If more district courts and more school boards had been as sensitive as those here involved to the requirements of the law, the path to the goal of school desegregation in this circuit would have been infinitely smoother than it had been." Carr v. Montgomery County Board of Education, 429 F.2d 382 (5th Cir. 1970).

States submitted a response to the defendants' first proposal, which incorporated additional desegregation suggestions. On February 16, 1974, the plaintiffs submitted their plan. On March 29, 1974, the defendants submitted their second plan, which was a revision of their January 15 proposal. On April 1, 1974, the plaintiff-intervenors submitted their proposal. In addition, the United States proposed a high school desegregation plan devised by authorities at the Maxwell Air Force Base in February and March, 1974. By letter of April 5, 1974, to the Court, the United States withdrew this proposal. Finally, on May 8, 1974, the school board presented to the Court certain modifications and adjustments to its March 29, 1974, plan.

A. *Plaintiffs' Plan*

Plaintiffs' proposed plan was devised by Dr. Gordon Foster, Director of the University of Miami Title IV Desegregation Center. The Foster plan at the senior and junior high school levels in general starts with the existing board proposal and seeks to achieve greater desegregation by the rerouting of existing bus routes and the reassignment of students to other schools which would require considerable increase in transportation. On the high school level, the Foster plan does not differ significantly from the board's plan. At the elementary level, through a combination of pairing of contiguous schools and clustering and pairing of noncontiguous schools, the Foster plan proposes to desegregate the schools within the system within the "15 percent" guidelines established by Dr. Foster. Dr. Foster testified that contiguous pairing was used wherever possible to minimize transportation. However, because of the degree of residential segregation in Montgomery, this was

felt by Dr. Foster to be feasible in only three instances. The pairing and clustering of elementary schools was the means used by Dr. Foster to bring each elementary school in each paired or clustered group, under his plan, within one-tenth of one percent of the exact racial percentage in each of the schools paired or clustered with two exceptions. The exact racial balance varies by two-tenths of one percent in these exceptions. The schools paired or clustered ranged in grade structures one-two, one-three, one-four, three-six, four-six, five-six, and 11 elementary schools under the plaintiffs' plan are grades one-six. The evidence reflects that the pairing or clustering of schools as proposed by the plaintiffs' plan would require extensive cross-city busing from beyond the westernmost part of the city to beyond the easternmost part of the city and the same is true from east to west. Elementary children at all grade levels, one through six, would be involved in this cross-city busing. It is evident, and this Court finds, that fracturization of grade structure and the pairing and clustering of schools in the Montgomery school system, as proposed by the plaintiffs, is for the sole purpose of attaining a strict racial balance in each elementary school involved.

Forty-three percent of the total number of elementary students enrolled in the Montgomery school system would be reassigned under the plaintiffs' plan. The plan would also necessitate the reassignment of a large number of elementary teachers since the teachers within the system should continue to teach at the grade levels where they have attained the greatest competency. This Court is impressed that the plaintiffs' plan would be disruptive to the educational processes and would place an excessive and

unnecessarily heavy administrative burden on the school system.

The plaintiffs' plan for the junior high school level adopts basically the defendant board's plan with certain significant changes. These changes consist of new cross-city and cross-county busing. This busing is proposed by the plaintiffs in order to bring the projected percentages of black students enrolled in each junior high school within the system within the 15 percent tolerance allowed under Dr. Foster's plan.[21] Dr. Foster's proposal would require a reassignment of 36 percent of the total junior high school enrollment in the system.

Dr. Foster proposes a plan of desegregation at high school level which requires noncontiguous and satellite zoning to more racially balance each high school. To accomplish this, 22 percent of all high school students would be reassigned from schools they presently attend.

Following is a summary of newly assigned and additionally transported students under the plaintiffs' plan:

Grade Level	Number Reassigned	Percentage of Total Enrollment Reassigned
1– 6	7,555	43
7– 9	3,493	36
10–12	1,637	22

[21] Dr. Foster uses a 15 percent variation or tolerance to determine the racial identifiability of the elementary and junior high schools in the system. That is to say, any elementary or junior high school with an enrollment of less than 33.5 percent black is racially identifiable as white. If the enrollment is more than 63.5 percent black the school is racially identifiable, according to Dr. Foster, as black. These variations are determined on the elementary and junior high school levels on the basis that 48.5 percent of the total elementary and junior high school students enrolled in the system are black and that 45.5 percent of the total high school enrollment is black.

A total of 12,685 students, or 36 percent of the total enrollment in the Montgomery school system, would be reassigned under the plaintiffs' plan.

The students requiring additional transportation under the plaintiffs' plan are as follows:

Elementary (1–6)	5,204
Junior High School (7–9)	1,642
Senior High School (10–12)	350

B. *Plaintiff-Intervenors' Plan*

The plaintiff-intervenors' plan was prepared by Dr. Larry Winecoff, a professor at the University of South Carolina. Dr. Winecoff originally submitted two plans, Plan A, with Plan A Alternate, and Plan B. Dr. Winecoff abandoned Plan B, and no evidence was offered in support of that plan. Dr. Winecoff set similar guidelines to those used by Dr. Foster in determining those schools which he considered to be racially identifiable in the Montgomery school system.[22] However, Dr. Winecoff used 10 to 14 percent as his tolerance in determining racial identifiability.

At the elementary level the grade structure of each elementary school within the system is fracturized under the plaintiff-intervenors' Plan A. This is done by dividing the existing one through six elementary grades into one through three centers and four through six centers. Dr. Winecoff also uses the rezoning technique of strip zones running generally vertically for grades one-three and elongated horizontally for grades four-six. He also uses noncontiguous satellite zoning in his one-three grades Plan A. The evidence reflects that four of the 16 elementary schools within the system, serving grades one-three, would

[22] See note 21, *supra*.

still be racially identifiable according to Dr. Winecoff's standards under his Plan A, one-three.

In Plan A, one-three alternate, Dr. Winecoff uses the same zone lines as used in his Plan A, one-three. Judged by his tolerances, 11 of the 16 schools serving grades one-three within the system would continue to be racially identifiable under Dr. Winecoff's Plan A, one-three alternate.

Plaintiff-intervenors' Plan A, four-six, uses elongated horizontal zones extending from the east side of the city to the west side of the city. This type of strip zoning would of necessity require substantial additional transportation and would also result in many elementary children having to walk a considerable distance farther to school. In some instances they would be required to walk past another elementary school serving grades one-three. Under this proposal, five of 13 schools serving grades four-six would continue to be racially identifiable according to Dr. Winecoff's tolerances.

The evidence reflects that from 60 to 70 percent of all elementary school students within the Montgomery system would be reassigned under plaintiff-intervenors' Plan A, one-three or one-three alternate, and Plan A, four-six. Furthermore, new transportation would be required for approximately 2,000 elementary grade children under the plaintiff-intervenors' elementary plans.

Plaintiff-intervenors' junior high school plan uses strip zoning of an elongated shape running obliquely. In some instances the seven-nine school zones proposed are only four blocks in width. From 50 to 60 percent of all students enrolled within the system in grades seven through nine would be reassigned under plaintiff-intervenors' junior

high level proposal. Furthermore, approximately 2,000 students would be newly transported.

The plaintiff-intervenors' senior high plan uses strip zones. For instance, the zone for the Jeff Davis school is from two to four blocks in width in certain areas. This proposal would require the reassignment of from 30 to 40 percent of the total high school enrollment within the system. The evidence reflects, and this Court now finds, that the plan proposed by the plaintiff-intervenors for the elementary, junior high, and senior high schools in the Montgomery school system is designed to achieve a racial balance in these schools.

C. *The School Board's Plan*

The school board utilizes transportation route changes, involving both black and white students, zone changes, the closing of physically inferior schools, the consolidation of schools, and the construction of new schools in its proposed plan for the system. Mr. Silas Garrett, Superintendent of Education for the school system and an experienced school administrator, testified that the following are the criteria that were utilized in formulating the board's plan:

1. To achieve a unitary school system.

2. To provide an organizational structure which will ensure optimum educational opportunities for all children with a minimum of disruption.

3. To adjust the assignment of students to available physical facilities.

4. To utilize available funds to the greatest educational advantage.

5. To achieve the maximum possible community acceptance of the plan thereby resulting in minimal resegregation.

6. To reassign students in a manner which enhances the instructional program of the system.

7. To provide for maximum teachability through the matching of assignments with teacher competencies and training.

8. To utilize the existing transportation in a supportive role to the instructional and organizational framework of the system.

9. To minimize disruptive transition for students, school personnel, and parents and at the same time comply with the mandate of the courts in achieving a unitary system.

At the present time, the Montgomery school system is operating pursuant to a desegregation plan which was prepared by a team of HEW experts and which was approved by this Court and by the United States Court of Appeals for the Fifth Circuit.[23] The plan when originally approved assigned both black and white students to every school in the system with the exception of Loveless School, which the Court of Appeals found to be a facility located so deep in the heart of a black residential area as not to be practical to desegregate. Since the implementation of the 1970 plan, the evidence in this case reflects that the school

[23] Carr v. Montgomery County Board of Education, 429 F.2d 312 (5th Cir. 1970).

board has attempted in good faith to ensure its effective operation. Additionally, since 1970, the school board has furthered the desegregation of the Montgomery system by closing the Billingslea elementary facility and consolidating that school with the Morningview School. The board proposes extensive plans for the transition of the Georgia Washington School, one-nine, now an all-black facility, into a substantially desegregated junior high school complex. Further substantial desegregation is proposed by the board in assigning white students to Carver Senior High and Carver Junion High. The board projects 61 percent whites in both schools that have heretofore been practically all black. Many other significant and effective assignments are to be made by the board—in each instance to attempt to achieve a unitary school system. Extracurricular activities have been expanded on a desegregated basis and inter-school participation through joint seminars and educational clinics has been developed.

The evidence reflects that the board considered the techniques of satellite zoning, clustering and pairing. However, the board concluded that it could establish a unitary system through the means and methods enumerated without the disruptions of satellite zoning, clustering and pairing as proposed by the plaintiffs and plaintiff-intervenors in order to achieve what the evidence in this case reflects would be an extremely unstable desegregated school system.

The evidence presented to the Court further reflects that the population of Montgomery is so arranged that whites largely live on the east side of the city and blacks on the west. This necessarily means that pairings and clusterings would, in the main, be noncontiguous and would require cross-city busing. This, of course, would substantially

increase the time and distance that students would have to travel to and from the schools to which they would be assigned under such plan.

Under the board's plan, there will remain a few schools with a substantially predominantly black student population. All of these are at the elementary level with the exception of McIntyre Junior High.[24]

An in-depth analysis of the school board's plan impresses this Court that the continued existence of some substantially predominantly black schools is genuinely nondiscriminatory. These schools, Daisy Lawrence, Booker T. Washington Elementary, Carver Elementary, Fews, Loveless, Hayneville Road Elementary, Paterson, Pintlala, Davis and Bellinger Hill, are in each instance located deep in black residential areas; the white students residing in these areas are assigned to the nearest of these schools. While this has to some extent desegregated practically all of these schools, no ratio has been accomplished that satisfies the plaintiffs and plaintiff-intervenors. The evidence reflects, and this Court finds, that in order to further desegregate any of these facilities, satellite zoning and the cross-city busing of white students would be necessary.[25]

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[24] Plaintiff-intervenors also project a heavily black enrollment at McIntyre. Plaintiffs would, under their proposal, achieve a projected 50 percent black-white ratio at McIntyre Junior High. However, this would be accomplished by satellite zoning and by transporting 550 whites for a considerable distance from the satellite Cloverdale area and periphery area to the McIntyre school. The only purpose in this is to attempt to achieve a racial balance in this school that is located deep in a black residential area.

[25] It is significant that Dr. Winecoff under his Plan A alternate leaves Carver Elementary at 85 percent black. Under his Plan A, Dr. Winecoff proposes to bus approximately 200 white students

Further, an exchange of black students would have to be made by transporting them across the city from these school areas. This would not, under the circumstances of this case, accomplish any effective and realistically stable desegregation. In each instance the situation is a result of residential patterns and not of the school board's action—either past or present.

It is significant to an overall evaluation of the board's plan that all of the students in the Montgomery school system[26] will attend a substantially desegregated school for the majority of their school careers. Over 80 percent of the black children in the system will attend a substantially desegregated school for at least six grades of the 12. One hundred percent of the black children in the system will attend a substantially desegregated senior high facility.[27] At the junior high school level, the only junior high facility under the board's plan that is projected to be over 80 percent black will be the McIntyre Junior High facility which, as this Court has previously noted, is impossible to effectively desegregate in a stable and workable manner.

A detailed analysis of the board's plan is attached and marked as Table 2 to this opinion. The chief criticism of the plaintiffs and plaintiff-intervenors of the board's plan is that the board is putting the primary burden of desegre-

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from the various school areas to Carver which would still leave Carver Elementary at 61 percent black. These students would have to pass three or four elementary schools to arrive at Carver.

[26] The only exception involves those students in the Montgomery County High-Dunbar Elementary area—and neither the plaintiffs nor the plaintiff-intervenors seriously attempt to desegregate these schools.

[27] For instance, Lanier—57 percent white, or Carver—61 percent white.

gating the Montgomery school system on the black students. The evidence does not bear this out. Approximately 4,000 white students and 5,000 black students are reassigned under the school board's plan. Furthermore, on the junior high level the board's plan proposes that three virtually all-black facilities be converted into predominantly white ones, that is, Carver Junior High from zero percent white to 61 percent white; Georgia Washington from zero percent white to 69 percent white, and Houston Hill from 15 percent white to 60 percent white.

As to the proposal of the board regarding the senior high schools within the system, the evidence reflects that all of the city senior high schools will be substantially desegregated.

III. Applicable Law

[1, 2] For several years it has been clear, and all parties in this case recognize, that

> the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools.

Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20, 90 S.Ct. 29, 24 L.Ed.2d 19 (1969). In determining what constitutes a "unitary" school system, there are six facets of school operation which must be considered. These six criteria are (1) faculty, (2) staff, (3) transportation, (4) extracurricular activities, (5) facilities, and (6) composition of the student body. Green v. County School Bd., 391 U.S. 430, 435, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968); Adams v. Rankin County Bd. of Educ., 485 F.2d 324, 325 (5th Cir. 1973).

Opinion dated May 22, 1974

A. *Faculty and Staff*

[3] In 1968, this Court ordered that the Montgomery County School Board must move toward a goal under which "in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system." As observed earlier, the United States Supreme Court affirmed that order. United States v. Montgomery County Bd. of Educ., *supra.*

An analysis of the evidence presented in this case [see Table 1] shows that the board is in full compliance with that order.

B. *Transportation, Extra-curricular Activities, Facilities*

There is no dispute as to the law regarding these indicia of desegregation. Suffice it to say that there can be no racial discrimination in any of these areas of school operation. None of the parties seriously contend the board is not in full compliance with the law in these areas. Appropriate factual findings will be made as to each criterion.

C. *Student Body Composition*

[4] While it is clear that in disestablishing a segregated school system all vestiges of racial segregation must be eliminated "root and branch," Green v. County School Bd., 391 U.S. 430, 437-438, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), the establishment of a fixed racial quota in each school is not required by the United States Constitution. The United States Supreme Court has ruled that

> [t]he constitutional command to desegregate schools does not mean that every school in every community

> must always reflect the racial composition of the school system as a whole.

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24, 91 S.Ct. 1267, 1280, 28 L.Ed.2d 554 (1971).

Thus, it appears that a balance must be reached, one unquestionably subtle in its implications: while school system segregation must be actively disestablished, racial quotas for student population are not to be instituted.

The difficulty of analysis is most acute when the Court is confronted, as it is in this case, with several schools which contain a student population which is largely of one race. Since this Court last considered the compliance of this school system with constitutional commands, many important cases have been decided by the appellate courts, necessitating a re-examination of the law with respect to schools whose student population does not typify the general population figures. The Supreme Court has, in a general manner, addressed the question of one-race schools, writing in *Swann* that

> [t]he record in this case reveals the familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city. In some circumstances certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change. Schools all or predominantly of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation.

In light of the above, it should be clear that the existence of some small number of one-race, or virtu-

> ally one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law. The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools. No *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely non-discriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25-26, 91 S.Ct. 1267, 1280, 28 L.Ed.2d 554 (1971).

Several cases dealing with one-race schools have been decided by the Court of Appeals for this circuit since this Court last fully considered compliance in this school system. While neither the Court of Appeals nor the Supreme Court has adopted any explicit, clear test by which to measure the constitutional validity of one-race schools, the Court of Appeals has, since this Court's last major order

in this case, reversed district courts in school cases and held that nine all-black schools in one system could not remain in existence,[28] that insufficient pairing had been ordered when schools which could be paired were about one and one-half miles away,[29] and that 14 all-black elementary schools in one system had to be paired or rezoned.[30] Other district courts were reversed because under court-approved plans 80 percent of the blacks attended schools where their race predominates,[31] because 70 percent of all black elementary students attended one all-black school,[32] because 68 percent of the black elementary school students in a system attended schools 90 percent or more black,[33] and because 44 percent of the black students in one system attended all-black or virtually all-black schools.[34] These cases, and others like them decided since this Court's last consideration of this case, necessitate a re-examination of this case in the light of the state of the law and the facts as they exist in the Montgomery school system today.

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[28] Bradley v. Bd. of Public Instruction, 431 F.2d 1377, 1380-1381 (5th Cir. 1970).

[29] Weaver v. Bd. of Public Instruction, 467 F.2d 473, 474 (5th Cir. 1972) (all-black school 1.2 to 5.6 miles from predominantly white elementary schools); Wright v. Bd. of Public Instruction, 431 F.2d 1200, 1201-1202 (5th Cir. 1970).

[30] Mannings v. Bd. of Public Instruction, 427 F.2d 874, 877 (5th Cir. 1970).

[31] United States v. Texas Education Agency, 467 F.2d 848, 872-873 (5th Cir. 1972) (en banc).

[32] Boykins v. Fairfield Bd. of Educ., 457 F.2d 1091, 1093 (5th Cir. 1972).

[33] Allen v. Bd. of Public Instruction, 432 F.2d 362, 366 (5th Cir. 1970).

[34] Pate v. Dade County, 434 F.2d 1151, 1153 (5th Cir. 1970).

Opinion dated May 22, 1974

IV. Plan Approved

[5] As is already evident from what has been stated in this opinion, this Court proposes to order implemented *in toto* the desegregation plan as proposed by the Montgomery County Board of Education on January 15, revised March 29, 1974, and modified May 8, 1974. The evidence in this case reflects that the plans proposed by the plaintiffs and by the plaintiff-intervenors will accomplish very little stable, long-term desegregation in this school system. This Court desires to emphasize that the remaining predominantly black schools in this school system under the board's plan cannot be effectively desegregated in a practical and workable manner. In each instance this Court has examined and re-examined the evidence and has determined that these predominantly black schools exist and continue to exist without any discriminatory board action. The board's proposal and this Court, in adopting same, have taken "into account the practicalities of the situation" that exist in this school system. Davis v. Board of Social Commissioners, 402 U.S. 33, 37, 91 S.Ct. 1289, 28 L.Ed.2d 577. The schools that will remain predominantly black in the Montgomery school system are the result of the concentrations of blacks in the western area of Montgomery. As the Supreme Court observed in Swann v. Charlotte-Mecklenburg, *supra*, the existence of a small number of predominantly black schools in such areas is not in and of itself a sign that a dual school system exists. The school authorities in the Montgomery school system have taken affirmative action to the extent required by the law and have achieved the greatest possible degree of actual desegregation, taking into account the "practicalities of the situation." As this Court has observed time and time again

in school desegregation cases, racial quotas and busing to achieve racial quotas are not required by the law.

A. *Elementary Schools*

The board has proposed, and this Court is adopting for elementary schools, what is in large measure a "neighborhood" or proximity plan, under which an elementary child normally attends the school nearest his home.

The Court is aware that any "neighborhood school" plan is *strictissimi juris* in this circuit and is to be adopted, if at all, only in narrowly confined instances. This is such a case.

In a *pure* neighborhood school system, as approved in Ellis v. Bd. of Public Instruction, 423 F.2d 203 (5th Cir. 1970), there are two requirements: (1) a strict proximity rule must be followed, under which neither man-made nor natural boundaries may be considered, but only travel distance;[35] and (2) the plan must be one which is effective to establish a unitary school system.

The second criterion, that the plan must effectively provide for a unitary system, was outlined in a footnote:

> [u]nder the facts of this case, *it happens that* the school board's choice of a neighborhood assignment system is adequate to convert the Orange County school system from a dual to a unitary system.

423 F.2d at 208, n. 7 (emphasis added).

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[35] "We also hold that the neighborhood system, based on school capacity, must be observed without exception. This will prevent any variance based on traffic conditions . . . . Variances by arbitrary zone lines, or for reasons of traffic, while reasonable on their face, may destroy the integrity and stability of the entire assignment plan. If Orange County wishes to maintain a neighborhood

However, in a series of cases the Court of Appeals has held that an *Ellis* neighborhood school plan, to be upheld, must provide for the ultimate conversion of a dual to a unitary school system.

In Andrews v. City of Monroe, 425 F.2d 1017 (5th Cir. 1970), the Court of Appeals held that in Monroe, Louisiana, a city with only 18 schools, an *Ellis* plan was constitutionally infirm if it left 85 percent of the black elementary students in all-black schools, or schools nearly so. 425 at 1019-1020.

In Henry v. Clarksdale Municipal Separate School District, 433 F.2d 387 (5th Cir. 1970), involving a small city with only seven elementary schools, the Court of Appeals reversed a plan which left three all-white elementary schools and four all-black. The Court of Appeals wrote that the order of the district judge "totally ignores the real key to *Ellis*, the strong caveat of footnote 7 . . . .", 433 F.2d at 390. Footnote 7 was the footnote in *Ellis* which noted that "it happens that . . . [the plan] is adequate to convert the . . . system from a dual to a unitary system." 423 F.2d at 208, n. 7.

Similarly, in Ross v. Eckels, 423 F.2d 1140 (5th Cir. 1970) (Houston, Texas, system), the Court of Appeals reversed a district judge's adoption of the *Ellis* plan where 29 percent of black students were in all-black or virtually all-black schools, 434 F.2d at 1146, n. 9, noting that each case had to be judged on its own facts. *Id.* at 1147.

In 1970 the Court of Appeals reversed a district court's adoption of an *Ellis* plan in Alexandria, Louisiana, where

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assignment system, then it must do so without variances. Each student in the system must be assigned to attend the school nearest his or her home, limited only by the capacity of the school, and then to the next nearest school." 423 F.2d at 207-208.

60 per cent of the black students were in schools where their race constituted 90 percent or more of the student body. The Court of Appeals held that

> [t]he end result is that neighborhood zoning in Alexandria, Louisiana, leaves the majority of the city's Negro students in a virtually segregated school system. The fact that the plan complies with the requirements for a neighborhood system as enunciated by this Court in [*Ellis*] does not make the system constitutionally palatable unless the plan actually works to achieve integration.

Valley v. Rapides Parish School Bd., 434 F.2d 144, 145 (5th Cir. 1970).

In a case from Lake Charles, Louisiana, the Court of Appeals reversed a district judge who had adopted an *Ellis* plan, pointing out that

> [a]s to ward 3, the Board plan is not up to constitutional standards. In many circumstances the *Orange County* approach of neighborhood schools is adequate to convert a school system from a dual to a unitary system. But, as *Orange County* itself makes clear, . . . each case turns on all of its own facts, including those peculiar to the particular system. . . . A plan which leaves two out of three black children in Lake Charles in schools all black or substantially so, . . . cannot be upheld as constitutional.

Conley v. Lake Charles School Board, 434 F.2d 35 (5th Cir. 1970).

However, the Fifth Circuit Court of Appeals has affirmed the use of the *Ellis* plan in some circumstances where the

result is a substantially desegregated school system. The Court of Appeals approved the use of an *Ellis* plan for the schools of Fulton County, Georgia (excluding Atlanta). In that case, only 18 percent of the black students attended all-black schools. While several elementary schools were largely black in composition, Judge Wisdom pointed out that "[e]very black student at some point in his school career will be exposed to complete desegregation. . . ." Hightower v. West, 430 F.2d 552, 555 (5th Cir. 1970). There,

> [a]s in so many other cases, these majority-black and all-black schools are the product of residential segregation and, historically, the location of schools to serve a segregated community.

430 F.2d at 555. The Court of Appeals found several deficiencies in the other plans offered at trial, among them that "[t]he pairing proposals . . . would produce longer walking distances and busing for these elementary school children." *Id.*

Similarly, the Court of Appeals approved the use of an *Ellis* plan in the schools of Anniston and Tuscaloosa. Lee v. Macon County Bd. of Educ., 429 F.2d 1218, 1222 (5th Cir. 1970).

The plan proposed by the school board in this case does not precisely fit the *Ellis* mold. The school assignment has not been effected by precise and mathematical distance measuring; some natural and man-made boundaries have been considered in the process of zoning. However, as this Court views *Ellis*, the *Ellis* plan in its purity is ultimately designed for the school system which is approaching unitary status and will be drawing its own lines. In such a situation a strict *Ellis* plan completely eliminates discre-

tion in student assignment, thus eliminating the possibility of discriminatory student assignment.

However, in this case the plan is under careful judicial scrutiny. This Court, long familiar with every aspect of this case, is convinced that where the board plan for *elementary* schools deviates from a strict *Ellis* proximity plan, the deviation is to maximize, rather than to minimize, desegregation; and thus is intended to help meet the constitutional burden which is upon the board.

[6] Therefore, while the school board plan does not strictly meet the absolute standard of *Ellis*, any deviation is for a permissible and proper purpose. Thus, this Court considers that the *principle* of *Ellis*—that neighborhood schools may be constitutionally proper—may be adopted by the district court *if* the line construction is under judicial scrutiny *and* the plan adopted effects desegregation of the complete system.

It is, therefore, necessary to consider whether the school board plan in this case for elementary schools is constitutionally proper.

The plan in *Ellis* itself, which the Court of Appeals held to be "adequate to convert the Orange County school system from a dual to a unitary system," 423 F.2d at 208 n. 7, provided for substantially less desegregation at the elementary level than does the school board plan in this case. In *Ellis, seventy-four percent* (74%) of black elementary pupils attended elementary schools which were at least *ninety-nine percent* (99%) black.[36]

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[36] In *Ellis*, the following elementary schools were at least 99 percent black: Callahan (99 percent); Eccleston (100 percent); Holden Street (99.8 percent); Hungerford (100 percent); Maxey (99.7 percent); Orange Center (100 percent); Richmond Heights (100 percent); Washington Shores (100 percent); Webster Ave-

While the school board's elementary plan here is better than that in *Ellis*, which was affirmed, it is also better than most of the plans which have been modified or reversed by the Court of Appeals for this circuit. For example, the Monroe, Louisiana, plan left 85 percent of the black elementary pupils in all-black schools. 425 F.2d at 1019-1020. The Clarksdale, Mississippi, plan appears to have left the elementary schools completely segregated. 433 F.2d at 390. The Alexandria, Louisiana, plan provided that 60 percent of the black students were in schools which were 90 percent or more black. 434 F.2d at 145.

[7] Thus, while the school board's elementary school plan does not completely eliminate all predominantly black schools on the elementary level, the Court is convinced that *considered as a part of a complete system, under the facts of this case,* the school board's elementary plan is constitutionally acceptable. There are several factors which the Court considers in arriving at this conclusion.

First, in this system, as Judge Wisdom has pointed out in another case, "[e]very black student at some point in his school career will be exposed to complete desegregation . . . ." Hightower v. West, 430 F.2d 552, 555 (5th Cir. 1970). Grades seven-twelve of the Montgomery system, under the board's plan, are to be completely desegregated.[37]

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nue (99 percent); and Wheatley (100 percent). A total of 6,376 black students attended those schools, out of a total black elementary school population of 8,628. Thus, 74 percent of all black elementary pupils in Orange County attended schools at least 99 percent black.

[37] The board's junior high plan would keep only 18 percent of the black junior high school students in schools 80 percent or more black [excluding Montgomery County High School], and no high school student would be in a school more than 43 percent black [excluding Montgomery County High School].

Second, the *system* as a whole will be desegregated. All of the other five indicia of a unitary school system have been completely met in this school system. Six members of the Court of Appeals,[38] concurring specially in an *en banc* case, have recently affirmed the proposition that normally the *system* as a whole is examined for purposes of determining whether the system is unitary; individual schools are not looked to for that purpose. United States v. Texas Education Agency, 467 F.2d 848, 888 (5th Cir. 1972) (*en banc*). In Montgomery County, Alabama, there is system-wide desegregation *of all six* facets and indicia of school desegregation.

Third, in the Fulton County, Georgia, case, the Fifth Circuit wrote of "the value of assigning young children to nearby schools . . . ." Hightower v. West, 430 F.2d 552, 556 (5th Cir. 1970). It cannot be denied that there is value in having elementary children attend schools near their homes. Recognition of this benefit of neighborhood elementary schools does not constitute abandonment of the goal of desegregation as required by the United States Constitution. If a neighborhood elementary school system can be effected without a sacrifice of constitutional standards, then such a plan should be adopted.

All factors considered, the neighborhood elementary school system proposed by the board is constitutionally adequate to effect desegregation under the facts of this case. This Court is convinced that to adopt the plans proposed by plaintiffs and plaintiff-intervenors would be

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It is conceded by all parties that Montgomery County High School, which is at the opposite end of the county from the city schools, cannot be effectively desegregated because of its isolation.

[38] Judges Brown, Wisdom, Gewin, Goldberg, Dyer, and Simpson.

to adopt a fixed racial quota for student population. The Supreme Court has indicated that not only is the imposition of racial quotas in schools not required, but a court may commit reversible error if it requires a fixed racial ratio in student population. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

B. *Junior High Schools*

[8] As observed earlier, under the board's plan the only junior high school facility that will be over 80 percent black will be the McIntyre facility. For the reasons previously noted, it is not feasible to further desegregate the McIntyre School in a stable and workable manner. This school continues to exist as a predominantly black school through no action on the part of the school board. Of the 13 junior high schools to be operated in the Montgomery system, McIntyre is the only one that comes close to being racially identifiable. For instance, Houston Hill (a formerly all-black school) will be 35 percent black, Goodwyn will be 34 percent black, Georgia Washington (a formerly all-black school) will be 31 percent black, Floyd will be 35 percent black, Cloverdale will be 33 percent black, Carver (a formerly all-black school) will be 39 percent black, Capitol Heights will be 38 percent black, Baldwin (a formerly all-white school) will be 73 percent black, and Bellingrath (a formerly all-white school) will be 62 percent black. This is the maximum under the circumstances that exist in the Montgomery school system that can be required of the board.

C. *Senior High Schools*

[9] The defendant board's plan on the senior high school level, as observed by the United States in its brief, "ap-

pears to be fully acceptable." As a matter of fact, there is very little, if any, controversy among the parties as far as the operation of the senior high schools in the Montgomery system is concerned.[39] The board proposes that Carver High be 39 percent black, that Jeff Davis be 38 percent black, that Lanier be 43 percent black and that Lee be 37%. Such a proposal for the senior high schools within the system is entirely acceptable.

In summary, every formerly all-white school in the Montgomery school system will, under the board's plan, be substantially desegregated. Several formerly all-white schools will now be predominantly black. Further, several formerly all-black schools will become predominantly white.

V. General Considerations

A. *Majority-to-Minority Transfer Rule*

[10] The previous orders entered by this Court in this case required the desegregation of not only the students but the faculty and staff, transportation, extra-curricular activities, and facilities and also required, among other things, a rule that the board allow any student enrolled in a school where his race is in the majority to transfer to a school where his race will be in a minority. This majority-to-minority transfer rule also requires the board to provide transportation for those electing to transfer pursuant to this rule. This transfer rule is a viable and effective doctrine in the Montgomery school system. Based on a report that was filed with the Court and made a part

[39] This is with the exception of Montgomery County High which was not proposed to be desegregated by any of the plans submitted by the parties by reason of its location in a remote area of the county.

of the records in this case, in December, 1973, over 600 blacks had elected to transfer under the majority-to-minority transfer rule. The majority-to-minority transfer policy was incorporated in the order made and entered in this case in February, 1970. Upon review of that order, the United States Court of Appeals for the Fifth Circuit in Carr v. Montgomery County Board, etc., 429 F.2d 382, directed that this Court's order be modified "in light of recent opinions of this court." In July, 1970, pursuant to the direction of the Court of Appeals, this Court ordered that the Montgomery County Board of Education shall provide transportation, if desired, for students transferring pursuant to this majority-to-minority transfer policy. The Court also ordered that students so transferring are to be given priority for space in the schools to which they transfer.

A majority-to-minority transfer provision in a school desegregation order is universally recognized by the courts as a useful tool to accomplish desegregation in a dual school system. As a matter of fact, the Supreme Court of the United States in Swann v. Board of Education, *supra*, stated:

> An optional majority-to-minority transfer provision has long been recognized as a useful part of every desegregation plan. Provision for optional transfer of those in the majority racial group of a particular school to other schools where they will be in the minority is an indispensable remedy for those students willing to transfer to other schools in order to lessen the impact on them of the state-imposed stigma of segregation. In order to be effective, such a transfer arrangement must grant the transferring student free

> transportation and space must be made available in the school to which he desires to move.

The vital importance of the effective operation of the majority-to-minority transfer has been noted by the Fifth Circuit in several cases.[40] In *Cisneros*, the *en banc* court stated:

> An overall amelioration of any possible discrimination will tend to be accomplished by the use of the mandatory majority to minority transfer provision of *Swann, supra*, 402 U.S. at 36-37, 91 S.Ct. 1267, 28 L.Ed. 2d 554, heretofore ordered by the district court. Such a provision will guarantee to both races an unfettered right to attend schools with members of an opposite race or identifiable ethnic group, and with transportation provided.

As stated, the Montgomery school board has and continues to implement a majority-to-minority transfer provision that complies with every requirement of the existing school desegregation laws.

B. *Biracial Committee*

[11] Up until this time, the Montgomery school board has not operated with the assistance of a biracial committee. In an order made and entered in this case on March 13, 1974, this Court stated:

> An over-all review of the applicable school desegregation decisions rendered since *Swann, Green*, and

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[40] Cisneros v. Corpus Christi Independent School District, 467 F.2d 142, 153 (5th Cir. 1972) (*en banc*); Ellis v. Bd. of Public Instruction of Orange County, 423 F.2d 203, 206 (5th Cir. 1970); Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211, 1218 (5th Cir. 1970) (*en banc*).

> *Davis* reflects that this Court is now required to give serious consideration to the appointment of a biracial committee. The biracial committee is to be constituted by this Court from names submitted by the parties to this litigation. The committee is to review the operation of the Montgomery County transportation system and the majority-to-minority transfer rule and is to be charged with responsibility in the area of selecting school sites. The committee will be authorized to hold hearings and make recommendations to the school board in connection with any of these activities.
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> It is further ordered that within 15 days from this date each party to this litigation submit to this Court the names of 20 citizens residing in Montgomery County, Alabama; one-half of the names submitted will be black citizens and the other half will be white citizens; the submission of these names is to be for the purpose of the Court's constituting from the names submitted a biracial committee for the purposes hereinabove discussed.

The parties have, as directed, submitted the names of citizens to the Court, and the Court has chosen from the names submitted 15 black citizens and 15 white citizens to constitute the Montgomery County school system's biracial committee. A separate order will be made and filed contemporaneously with this order designating the citizens who are to constitute this committee and outlining their functions and responsibilities. The Chairmanship of the committee will be rotated each two years with the committee selecting the chairman to succeed the initial chairman being designated by this Court. The membership of

the committee represents a cross-section of the Montgomery, Alabama, area with regard to race, sex, and ethnic and economic backgrounds. The Montgomery County Board of Education will be required to cooperate with the committee or any of its subcommittees, furnishing any information, records or documents requested by said committee.

C. *Arbitrary Tolerances or Guidelines*

As noted earlier, the plaintiffs' expert witness, Dr. Foster, and the plaintiff-intervenors' expert witness, Dr. Winecoff, instead of evaluating the system as a whole, evaluate each school within the system independently for the purpose of arriving at certain conclusions that some schools within the system continue to be "racially identifiable." In doing this, Dr. Foster uses a 15 percent variation or tolerance and Dr. Winecoff uses a 10 to 15 percent variation or tolerance to determine the racial identifiability of elementary and junior high schools in the Montgomery school system. These variations are determined on the elementary and junior high school level on the basis that 48.5 percent of the total elementary and junior high school students enrolled in the system are black. This means that, pursuant to Dr. Foster's computation (a similar procedure is followed by Dr. Winecoff), any elementary or junior high school with an enrollment less than 33.5 percent black is "racially identifiable" as white. If the enrollment is more than 63.5 percent black, the school, according to Dr. Foster, is "racially identifiable" as black.

[12] The use of such variances or tolerances is highly artificial and cannot be applied in the Montgomery County school system without severely and unnecessarily disrupting the operation of the system and without severely and unnecessarily impinging on the educational processes in the Montgomery school system. The application of such for-

mulas must of necessity proceed on the theory that a racial balance is to be achieved and is required under the law. Furthermore, the formalistic and mechanical application of the 15 percent tolerance of Dr. Foster of the 10 to 15 percent tolerance or deviation of Dr. Winecoff gives no consideration whatsoever to the other indicia in school desegregation cases such as faculty, transportation, facilities and extra-curricular activities. To label schools that do not fall within these tolerances or deviations as "racially identifiable" means that, in order not to be "racially identifiable," each school within any school system must meet certain predetermined ratios. As this Court has stated through the years time and time again, racial balance is not constitutionally required. The Supreme Court of the United States in Swann v. Board of Education, *supra*, emphasized this by stating:

> [i]f we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.

VI. Conclusion

This Court feels an obligation to point out that its allowance of a neighborhood elementary school system does not constitute an abandonment by this Court of the goal of securing to all citizens their rights guaranteed by the Fourteenth Amendment. This Court has always strived to guarantee to all citizens, both black and white, their right to

equal protection of the laws. This Court has never balked at the enforcement of constitutional rights in racial discrimination cases. In the last nineteen years, this Court has sat in cases in which the constitutional rights of black citizens had been denied in that blacks were discriminated against when they sought an equal right to use buses,[41] airports,[42] libraries,[43] parks,[44] and YMCA's.[45] The Court has further dealt with racial discrimination in the areas of voting rights,[46] jury selection,[47] and governmental hiring by both state [48] and federal[49] governments, and has also dealt

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[41] Lewis v. Greyhound Corp., 199 F.Supp. 210 (M.D.Ala. 1961); Browder v. Gayle, 142 F.Supp. 707 (M.D.Ala. 1956), aff'd, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (1957).

[42] United States v. City of Montgomery, 201 F.Supp. 590 (M.D. Ala. 1962).

[43] Cobb v. Montgomery Library Board, 207 F.Supp. 880 (M.D. Ala. 1962).

[44] Gilmore v. City of Montgomery, 176 F.Supp. 776 (M.D.Ala. 1959).

[45] Smith v. YMCA, 316 F.Supp. 899 (M.D.Ala. 1970), aff'd 462 F.2d 634 (5th Cir. 1972).

[46] State of Alabama v. Rogers, 187 F.Supp. 848 (M.D.Ala. 1960), aff'd 285 F.2d 430 (5th Cir. 1961); *United States* v. *State of Alabama*, 252 F.Supp. 95 (M.D.Ala. 1965); United States v. Parker, 236 F.Supp. 511 (M.D.Ala. 1964); United States v. Cartwright, 230 F.Supp. 873 (M.D.Ala. 1964); United States v. Penton, 212 F.Supp. 193 (M.D.Ala. 1962); United States v. State of Alabama, 192 F.Supp. 677 (M.D.Ala. 1961).

[47] Penn v. Eubanks, 360 F.Supp. 699 (M.D.Ala. 1973); White v. Crook, 251 F.Supp. 401 (M.D.Ala. 1966).

[48] NAACP v. Allen, 340 F.Supp. 703 (M.D.Ala. 1972), aff'd, 493 F.2d 614 (5th Cir. 1974); Strain v. Philpott, 331 F.Supp. 836 (M.D.Ala. 1971); United States v. Frazer, 317 F.Supp. 1079 (M.D.Ala. 1970); 297 F.Supp. 319 (M.D.Ala. 1968).

[49] Penn v. Schlesinger, 350 F.Supp. 752 (M.D.Ala. 1973), aff'd, 490 F.2d 700 (5th Cir. 1973), rehearing en banc granted (5th Cir. 1974).

with governmental districting.[50] In the school field, this Court has decided cases which involved aid to private schools,[51] school desegregation on the level of local schools,[52] statewide administration,[53] athletic programs,[54] faculty,[55] graduate schools,[56] and trade schools and junior colleges.[57] This Court stands on its record showing its willingness to protect, where necessary, the constitutional rights of black citizens against racial discrimination by government officials. This Court has not in the past allowed, and is not now allowing, the violation of constitutional rights to go

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[50] Yelverton v. Driggers, 370 F.Supp. 612 (M.D.Ala. 1974).

[51] Gilmore v. City of Montgomery, 337 F.Supp. 22 (M.D.Ala. 1972), modified and aff'd, 473 F.2d 832 (5th Cir. 1972), cert. granted, 414 U.S. 907, 94 S.Ct. 215, 38 L.Ed.2d 145 (1973); Crenshaw County Private School Foundation v. Connally, 343 F.Supp. 495 (M.D.Ala. 1972), aff'd, 474 F.2d 1185 (5th Cir. 1973); Lee v. Macon County Bd. of Educ., 267 F.Supp. 458 (M.D.Ala. 1967); 231 F.Supp. 743 (M.D.Ala. 1964).

[52] Lee v. Macon County Bd. of Educ., 292 F.Supp. 363 (M.D. Ala. 1968); 289 F.Supp. 975 (M.D.Ala. 1968); 270 F.Supp. 859 (M.D.Ala. 1967); 231 F.Supp. 743 (M.D.Ala. 1964); Harris v. Crenshaw County Bd. of Educ., 259 F.Supp. 167 (M.D.Ala. 1966); Franklin v. Barbour County Bd. of Educ., 259 F.Supp. 545 (M.D.Ala. 1966); Harris v. Bullock County Bd. of Educ., 253 F.Supp. 276 (M.D.Ala. 1966); Carr v. Montgomery County Bd. of Educ., 253 F.Supp. 306 (M.D.Ala. 1966).

[53] Lee v. Macon County Bd. of Educ., 267 F.Supp. 458 (M.D. Ala. 1967).

[54] Lee v. Macon County Bd. of Educ., 283 F.Supp. 194 (M.D. Ala. 1968).

[55] Carr v. Montgomery County Bd. of Educ., 289 F.Supp. 647 (M.D.Ala.), aff'd as modified, 400 F.2d 1 (5th Cir. 1968), aff'd 395 U.S. 225, 89 S.Ct. 1670, 23 L.Ed.2d 263 (1969).

[56] Parker v. Franklin, 223 F.Supp. 724 (M.D.Ala.), aff'd as modified, 331 F.2d 841 (5th Cir. 1964).

[57] Lee v. Macon County Bd. of Educ., 317 F.Supp. 103 (M.D. Ala. 1970), aff'd 453 F.2d 524 (5th Cir. 1971).

unremedied. In adopting the school board's plan providing for elementary schools under a "neighborhood" system, this Court in all respects is following the mandate of the Fourteenth Amendment and has arrived at the conclusions stated herein upon an evaluation of the Montgomery school system *as a whole.*

Opinion dated May 22, 1974

TABLE 1

FACULTY DESEGREGATION

	Name of School	September 1973		1974-75 Projections	
		Black	White	Black	White
1	Baldwin	18	22	8	12
2	Bear	8	13	9	14
3	Bellingar Hill	4	4	4	7
4	Bellingrath	17	28	18	25
5	Booker T. Washington (Elementary)	6	7	6	6
6	Booker T. Washington (Jr. High)	5	6	To be closed	
7	Capitol Heights (Elementary)	10	15	6	7
8	Capitol Heights (Jr. High)	17	25	15	22
9	Carver (Elementary)	15	19	7	10
10	Carver (Jr. High)	8	12	13	19
11	Carver (Sr. High)	21	25	19	28
12	Cutoma	3	6	4	4
13	Chilton	4	4	To be closed	
14	Chisholm	13	21	14	20
15	Cloverdale	19	27	18	24
16	Crump	11	16	13	19
17	Daisy Lawrence	9	13	8	11
18	Dalraida	11	13	9	11
19	Donnelly	14	19	10	13
20	Davis	11	17	11	17
21	Dunbar	7	11	8	9
22	Fews	9	10	10	14
23	Flowers	12	17	11	15
24	Floyd	17	26	19	25
25	Forest Avenue	7	11	7	10
26	Georgia Washington	8	13	16	25
27	Goode Street	6	7	3	5
28	Goodwyn	22	32	22	28
29	Harrison	12	16	12	14
30	Hayneville Road	18	23	15	23
31	Head	9	13	8	11
32	Highland Avenue	7	10	7	9
33	Highland Gardens	15	20	15	20
34	Houston Hill	8	10	8	11
35	Jefferson Davis	32	61	36	59
36	Johnson	10	13	10	13
37	Lanier	37	63	39	49
38	Lee	55	65	40	65
39	Loveless	13	14	16	23
40	McIntyre	17	25	12	19
41	Machillion	7	7	6	7
42	Madison Park	3	5	To be closed	
43	Montgomery Area Voc. Center	5	14	8	11
44	Montgomery County High	9	15	9	12
45	Morningview	10	13	9	13
46	Paterson	13	14	11	14
47	Peterson	9	11	8	11
48	Pintlala	4	6	4	6
49	So. Hilltown	10	14	9	13
50	Union St. Area Voc. Center	10	13	14	17
51	Eastern Bypass (Elementary)	—	—	10	16
52	Vaughn Road (Elementary)	—	—	9	12

Opinion dated May 22, 1974

TABLE 2

ELEMENTARY

SCHOOL	Actual Enrollment, March, 1974 Black	White	Total	% Black	Projected Under Board Plan Black	White	Total	% Black
BEAR	75	503	578	12.9%	186	505	691	27%
BELLINGER HILL ELEM.	108	42	150	72	186	43	229	81
BELLINGRATH ELEM.	116	83	199	58.3	115	100	215	53
BOOK WASH. ELEM.	253	4	257	98	259	4	259	98
CAPT. HGTS. ELEM.	120	463	583	20.5	119	192	311	38
CARVER ELEM.	846	2	848	99	421	2	423	99
CATOMA ELEM.	70	163	233	30	63	154	217	29
CHILTON ELEM.	127	14	140	90	Closed-assigned to Oakrails and Head			
CHISHOLM ELEM.	338	545	883	37	326	555	881	37
CRUMP ELEM.	87	690	779	11	263	703	966	27
DAISY LAWRENCE ELEM.	449	7	456	98	445	7	452	98
DALRAIDA ELEM.	69	577	646	10.6	153	428	581	26
DANNELLY ELEM.	96	915	1,011	9.5	236	484	720	32
DAVIS ELEM.	627	89	716	87	615	91	706	87
DUNBAR ELEM.	339	50	389	87	340	51	391	87
FEWS ELEM.	443	2	445	99	640	3	643	99
FLOWERS ELEM.	126	628	754	16.7	169	573	742	23
FLOYD ELEM.	191	312	503	37.9	145	319	467	32
FOREST AVENUE ELEM.	176	269	445	39.5	172	262	434	40
GEORGE WASH. ELEM.	323	3	326	99	Consol. with new schools			
GOOCH ST. ELEM.	279	1	280	99	Converted to center for handicapped			
HARRISON ELEM.	298	433	731	40	184	427	611	30
HAYNV. RD. ELEM.	679	29	708	96	669	30	699	95
HEAD ELEM.	63	531	594	11.3	148	415	563	26
HIGHLAND AV. ELEM.	118	271	389	30.3	115	272	387	30
HIGHLAND GARDENS EL.	414	555	969	37.5	335	551	886	38
JOHNSON ELEM.	48	557	605	7.9	175	550	725	24
LOVELESS ELEM.	289	0	289	100	902	5	907	99
McINTYRE ELEM.	615	5	620	99.2	Consol. with Loveless			
MACMILLAN ELEM.	204	105	309	66	225	109	334	65
MADISON PARK ELEM.	142	0	142	100	Closed-assigned to Eastern By-pass			
MORNINGVIEW ELEM.	131	467	598	22	134	466	600	22
PATERSON ELEM.	557	32	589	94	566	34	600	94
PETERSON ELEM.	174	299	473	36.7	175	299	474	37
PINTLALA ELEM.	205	14	219	93	201	16	220	93
SOUTHLAWN ELEM.	157	491	648	24	223	492	715	31
EASTERN BY-PASS EL.					149	589	738	20
VAUGHAN RD. ELEM.					188	409	597	32
TOTALS	9,279	9,170	13,449		9,224	9,160	18,384	

JUNIOR HIGH

	Black	White	Total	% Black	Black	White	Total	% Black
BALDWIN JR.	553	635	1,193	46.7	290	107	397	73
BELLINGRATH JR.	680	373	1,053	64	659	390	1,049	62
BOOK WASH. JR.	221	0	221	100	Consol. with Capt. Hgts., Dow, and Houston Hill			
CAPT. HGTS. JR.	313	889	1,202	26	442	730	1,172	38
CARVER JR.	534	0	534	100	350	545	895	39
CLOVERDALE JR.	156	1,351	1,507	10.3	437	875	1,312	33
FLOYD JR.	159	575	734	21.6	288	541	829	35
HAYNV. RD. JR.	280	17	297	91.2	Consol. with Floyd and Goodwyn			
G. WASHINGTON JR.	160	0	160	100	357	782	1,139	31
GOODWYN JR.	259	1,339	1,598	16	540	1,031	1,571	34
HOUSTON HILL JR.	326	57	383	85	210	383	593	35
LOVELESS JR.	353	0	353	100	Consol. with McIntyre			
McINTYRE JR.	391	18	409	96	792	14	806	98
TOTALS	4,390	5,254	9,644		4,365	5,398	9,763	

SENIOR HIGH

	Black	White	Total	% Black	Black	White	Total	% Black
CARVER SR.	958	6	964	99	439	660	1,099	39
JEFF. DAVIS SR.	412	1,668	2,080	19.8	868	1,426	2,294	38
TANNER SR.	951	1,284	2,219	42.5	817	1,068	1,885	43
LEE SR.	661	1,577	2,238	30.2	929	1,560	2,489	37
MTGY. CO. HIGH SR.	391	61	452	86.5	399	63	462	86
TOTALS	3,373	4,550	7,923		3,452	4,777	8,229	

Opinion dated April 11, 1975

ARLAM CARR, JR., a minor by Arlam Carr and Johnnie Carr, etc., et al.,

Plaintiffs-Appellants,

NATIONAL EDUCATION ASSOCIATION, INC.,

Intervenor,

PENELOPE ANNE JENKINS, ET AL.,

Intervenors-Appellants,

v.

MONTGOMERY COUNTY BOARD OF EDUCATION, ET AL., ETC.,

Defendants-Appellees,

UNITED STATES OF AMERICA,

Amicus Curiae,

No. 74-2633.

United States Court of Appeals,
Fifth Circuit.

April 11, 1975.

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM:

We affirm the judgment of the district court for the reasons set forth in its opinion, 377 F.Supp. 1123 (M.D. Ala. 1974). The judgment of the district court is attached as Appendix A. We take note of the history of this litigation as reflected by the opinions of the district court, this court, and the Supreme Court cited in the district court's opinion. The Montgomery County school system has been under the scrutiny and surveillance of the federal judiciary for a substantial period of time and such scrutiny and surveillance will continue.

Affirmed.

Opinion dated April 11, 1975

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ARLAM CARR, JR., ET AL.,

Plaintiffs,

NATIONAL EDUCATION ASSOCIATION, INC.;
PENELOPE ANNE JENKINS, ET AL.,

Plaintiff-Intervenors,

UNITED STATES OF AMERICA,

Amicus Curiae,

v.

MONTGOMERY COUNTY BOARD OF EDUCATION, ET AL.,

Defendants.

Civil Action No. 2072-N

JUDGMENT

Pursuant to the findings of fact and conclusions of law made and entered in a memorandum opinion filed in this cause this date, it is the order, judgment and decree of this Court that:

1. The plans presented by the plaintiffs and plaintiff-intervenors for the further desegration of the Montgomery County school system be and are hereby rejected.

2. The plan presented by the defendant Montgomery County Board of Education on January 15, 1974, revised on March 29, 1974, and modified on May 8, 1974, be and is hereby approved and ordered implemented.

Opinion dated April 11, 1975

3. The school board's plan will be implemented forthwith, with the student assignments to the various schools within the system to be effective with the commencement of the 1974-75 school year.

4. The school board will file with the Court on September 15, 1974, and on February 15, 1975, and on said dates each year thereafter, written reports reflecting the actual student and teacher assignments, by race, in each school in the system.

5. The costs incurred in this proceeding be and they are hereby taxed one-half against the plaintiffs and one-half against the plaintiff-intervenors.

Done, this the 22nd day of May, 1974.

/s/ FRANK M. JOHNSON
United States District Judge

GOLDBERG, Circuit Judge (dissenting):

Respectfully, but without equivocation, I dissent.

This suit was brought in 1964 to desegregate the public schools in Montgomery County, Alabama. Its progress has been recorded at several stages in opinions by the able District Judge, by this Court, and by the Supreme Court.[1] In August, 1973, the district court ordered the parties then in this case—the plaintiffs, the defendant School Board, and the United States—to submit proposals for further desegregation of the Montgomery County system in light of

[1] Carr v. Montgomery County Bd. of Educ., M.D.Ala. 1964, 232 F.Supp. 705; further relief ordered, 1966, 253 F.Supp. 306; further relief ordered, 1968, 289 F.Supp. 647, aff'd, 5 Cir., 400 F.2d 1, aff'd, 1969, 395 U.S. 225, 89 S.Ct. 1670, 23 L.Ed.2d 263, further relief ordered by district court, 1970, [unreported], aff'd with modifications, 5 Cir. 1970, 429 F.2d 382.

decisions by this Court and the Supreme Court since the entry in 1970 of the last comprehensive order in the case. One week later, plaintiffs-intervenors, Jenkins, et al., filed their motion to intervene, which was granted in February, 1974. During the first four months of 1974, plaintiffs, plaintiffs-intervenors, and the School Board each prepared and proposed new pupil assignment plans. Hearings were held on each plan in April. The School Board amended its plan in response to prodding from the Bench, and in an order entered May 22, 1974, and opinion reported at 377 F.Supp. 1123, the district court adopted the School Board plan, as amended, in its entirety. Costs were taxed half against the plaintiffs and half against the plaintiffs-intervenors.

The plaintiffs, the plaintiffs-intervenors, and the United States appeal, arguing between them that the district court erred in adopting the School Board's plan for the assignment of elementary and junior high school students, that the School Board assignment plan saddles black elementary school students with a disproportionate transportation burden, and that costs should have been taxed against the School Board.

I would hold that the district court should not have adopted the School Board's proposed assignment plan for the elementary grades because it fell short of establishing a unitary school system, and there was no sufficient finding that no workable alternative could be implemented. The record indicates additionally that the School Board plan for the assignment of junior high students, as implemented, fails to comply with constitutional mandates. Accordingly, I would remand to the district court for further proceedings to develop workable unitary school assignment plans for the elementary and junior high grades.

In light of this I would find it unnecessary at the time to pass on the appellants' claims of unequal transportation burdens. I would vacate the district court's award of costs in favor of the School Board, to permit the entry of an appropriate award after the further proceedings on remand.

I

Background

For the 1973-74 term, Montgomery County public schools enrolled 36,016 students, 17,042 (47%) of whom were black, and 18,974 (53%) white, in some 54 regular schools, organized along a 1-6, 7-9, 10-12 pattern. The 36 elementary schools enrolled 18,449 students (9,279, or 50%, black), the 13 junior high schools, 9,644 (4,390, or 45%, black), and the 5 high schools 7,923 (3,373, or 43%, black).[2] All but 7 of the schools then in use stood within the corporate limits of the City of Montgomery, and the total county population is similarly concentrated within the City.

The student population residing in the area of Montgomery County outside the City is predominantly black. Within the City the student population is predominantly white: the eastern half of the City is more concentratedly white; most of the western half is virtually all-black; and a narrow integrated corridor running North-South bisects the City. Under the desegregation plan adopted in 1970 and effective in 1973-74, most pupils within the City were assigned to neighborhood schools. Outside the City, school children in all but the extreme south of the county[3] were

[2] I rely here upon the figures referenced in the district court's opinion, although the plaintiffs-intervenors assign some minor inaccuracies thereto.

[3] These students attended Dunbar Elementary School (1-6), and Montgomery County High School (7-12), both of which remain virtually all-black under all plans proposed to the district court.

organized into "periphery zones." Most of these "periphery zone" students were bused to schools in the City, and they made up the majority of the 11,176 students (31%) bused by the county.[4]

Implementation of the neighborhood assignment based plan adopted in 1970 left a high number of all-one-race or virtually all-one-race schools. The record discloses that in the Spring of 1974, 15 elementary schools were 87% or more black, and 6 were 87% or more white; 6 junior highs were 94% or more black, another was 85% black, and 1 was 90% white; 1 senior high was 99% black, and another was 86% black. Responding to these conditions, in its order below the district court replaced its 1970 plan with the School Board's most current proposal. That plan adheres to the techniques employed in the 1970 plan, and, unlike the plans suggested by the plaintiffs and plaintiffs-intervenors, eschews pairing or clustering of schools.

At the high school level, the School Board plan employs rezoning and peripheral reassignments to reduce the percentages of black students at each City school to 33-48%; only Montgomery County High School, in the extreme south of the County, retains an 87% black student body.[5] None of the appellants question the propriety of this high school plan, and it requires no further discussion. Rather, this appeal was brought to test the constitutional sufficiency of the School Board's student assignment plans for the elementary and junior high levels. I will discuss each of the two educational stages in turn.

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[4] During the 1973-74 term, some 5,388 elementary school students, 3,759 junior high students, and 2,029 senior high students were bused.

[5] *See* Appendix C; *see also* note 35 *infra*.

Opinion dated April 11, 1975

II

Elementary School Plan

The plaintiffs and plaintiffs-intervenors each proposed alternative plans for assignment of elementary school students. Each plan aimed at eliminating "racially identifiable" schools, defined at the outset by each plan's architect as a school whose racial balance varied more than 10-15% from the racial make-up of the county-wide student body for that level. Neither plan clung strictly to such statistical profiles, however, and each left at least one virtually all-black elementary school.

The plaintiffs' plan was directed only toward the elementary schools within the City. It generally retained the zone lines drawn by the School Board, but changed assignment patterns within those zones through pairing and clustering, and some modification of peripheral assignments, to reach a 24-66% black concentration in each city school. The district court calculated that implementation of the plaintiffs' plan would require reassignment of 43% of the elementary school population and additional transportation of 28% of the elementary student body. The district court concluded that the plaintiffs' plan was designed "for the sole purpose of attaining a strict racial balance in each elementary school involved," 377 F.Supp. at 1129, and that the increased busing, large scale reassignment of students and teachers, and the "fracturization of grade structure" inherent in pairing and clustering, "be disruptive to the educational processes and would place an excessive and unnecessarily heavy administrative burden on the school system." *Id.*

The plaintiffs-intervenors proposed a more complicated overhaul of elementary school assignments. Their plans

abandoned the School Board zone lines, replacing them with two sets of new zones: one set of strip zones, running generally North-South, for grades 1-3; another set of strip zones, running generally East-West, for grades 4-6. Utilizing this basic network the plaintiffs-intervenors offered two possible plans. The simpler plan merely assigned students to the school within their proposed contiguous zone. This left 400 black students in grades 4-6 in a school 81% black, and 2233 of the black primary grade 1-3 children in schools 84% or more black. The plaintiffs-intervenors' alternative, and preferred, plan retained their grade 4-6 zone pattern and the single 81% black school, but added satellite zoning to the primary grade assignments, reducing to 402 the total of black students in one 84% black primary school. The plaintiffs-intervenors' plan offered transportation advantages over the plantiffs' plan, requiring additional busing for only 11% of the elementary school students, according to the district court. There was evidence that the plaintiffs-intervenors' plan would prove the more likely thwarted in practice, however, and the district court found that implementation of either of the plaintiff-intervenors' plans would involve reassignment of 60-70% of all of the elementary school population. The district court entered no specific findings as to the workability of the plaintiffs-intervenors' plans.

The School Board plan adopted by the district court for the assignment of elementary school children furthers desegregation by closing 5 previously virtually all-black elementary schools and assigning some pupils from these schools to predominantly white schools, and by reassigning some 400 black students at another virtually all-black school to 4 predominantly white schools. Under this plan, however, 55% of the black students were projected to be en-

rolled at elementary schools 87% or more black, and 44% were expected to attend elementary schools 93% or more black. The statistics showing actual enrollment as of September 15, 1974, demonstrate that the true profiles are slightly worse.[6] Under the School Board plan no white elementary school students were reassigned to a school that would remain predominantly black. The School Board estimated that its elementary school plan would produce a significant net reduction of transportation.

A

Unitary School System

As the Supreme Court established in Green v. School Bd. of New Kent County, 1968, 391 U.S. 430, 436, 88 S.Ct. 1689, 1693, 20 L.Ed.2d 716, 722, "The transition to a unitary, nonracial system of public education . . . is the ultimate end to be brought about" in school desegregation cases. In this pursuit the school authorities and district court "will . . . necessarily be concerned with the elimination of one-race schools." Swann v. Charlotte-Mecklenburg Bd. of Educ., 1971, 402 U.S. 1, 26, 91 S.Ct. 1267, 1281, 28 L.Ed.2d 554, 572. The district court, relying on Ellis v. Board of Public Instruc. of Orange County, 5 Cir. 1970, 423 F.2d 203 (*Ellis I*), concluded, however, that the persistence of virtually all-black elementary schools in Montgomery County under the School Board's "neighborhood assignment" plan did not prevent that system from reaching the unitary status mandated by *Green*. I disagree.

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[6] *See* Appendix A & note 37 *infra*.

Ellis I approved, as modified,[7] a student desegregation plan for Orange County, Florida, which was based on neighborhood school assignments and left several virtually all-black schools. We held that "[u]nder the facts of this case, it happens that the school board's choice of a neighborhood assignment system is adequate to convert the Orange County school system from a dual to a unitary system." 423 F.2d at 208, n. 7. *Ellis I* did not, however, automatically sanctify any "neighborhood school" student assignment plan which placed the same percentages of students in fully integrated schools. Rather, as we explicitly cautioned,

> There are many variables in the student assignment approach necessary to bring about unitary school systems. The answer in each case turns, in the final analysis, as here, on all of the facts including those which are peculiar to the particular system.

423 F.2d at 208, n. 7. This passage has become a refrain in our school desegregation decisions.[8] Indeed, our school desegregation cases are too numerous, their facts, figures, and conditions too particular, and our remedies too flexibly fashioned, to lend themselves to a simple sorting into neat rows. But I believe that the weight of our pre-*Swann* decisions adopting and adapting the neighborhood assignment approach of *Ellis I* do not permit us to certify the School Board's plan for Montgomery as the achievement

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[7] The district court's opinion below, 377 F.Supp. at 1137 n.36, erroneously reads the *Ellis I* opinion as approving the degree of desegregation under the Orange County plan without modification.

[8] *See, e.g.*, Henry v. Clarksdale Mun. Sep. Sch. Dist., 5 Cir. 1970, 433 F.2d 387, 390; Andrews v. City of Monroe, 5 Cir. 1970, 425 F.2d 1017, 1019.

of a unitary system.[9] As we concluded in Allen v. Board of Public Instruc. of Broward County, 5 Cir. 1970, 432 F.2d 362, "In the conversion from dual school systems based on race to unitary school systems, the continued existence of all-black or virtually all-black schools is unacceptable where reasonable alternatives exist." [10]

Even were the School Board's plan adequate to achieve a unitary school system under *Ellis I* and the cases immediately following it, however, I think it manifest that the School Board's plan cannot stand after *Swann,* Davis v. Board of School Comm'rs of Mobile County, 1971, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577, and Keyes v. School District No. 1, 1973, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548. *Swann* shed new light on the constitutional requisites in school desegregation cases, and since *Swann* we have refused to accept mere compliance with our decision in *Ellis I* as the mark of a school board plan's constitutional suffi-

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[9] *See, e.g.,* Ross v. Eckels, 5 Cir. 1970, 434 F.2d 1140, cert. denied, 1971, 402 U.S. 953, 91 S.Ct. 1614, 29 L.Ed.2d 123; Valley v. Rapides, 5 Cir. 1970, 434 F.2d 144; Conley v. Lake Charles School Bd., 5 Cir. 1970, 434 F.2d 35; Allen v. Board of Public Instruc. of Broward County, 5 Cir. 1970, 432 F.2d 362, cert. denied, 1971, 402 U.S. 952, 91 S.Ct. 1609, 1612, 29 L.Ed.2d 123; Pate v. Dade County School Bd., 5 Cir. 1970, 434 F.2d 1151, cert. denied, 1971, 402 U.S. 953, 91 S.Ct. 1613, 29 L.Ed.2d 123; Bradley v. Board of Public Instruc. of Pinellas County, 5 Cir. 1970, 431 F.2d 1377, cert. denied, 1971, 402 U.S. 943, 91 S.Ct. 1608, 29 L.Ed2d 111; Hightower v. West, 5 Cir. 1970, 430 F.2d 552; Mannings v. Board of Public Instruc. of Hillsborough County, 5 Cir. 1970, 427 F.2d 874. In each of these "neighborhood assignment" cases we required that the concentration of black students attending virtually all-black schools be reduced far below the level accomplished under the School Board plan for Montgomery. This is not, of course, to disregard the complex of other variables present in each case. *See also* Wright v. Board of Public Instruc. of Alachua County, 5 Cir. 1970, 431 F.2d 1200.

[10] Quoted with approval in Boykins v. Fairfield Bd. of Educ., 5 Cir. 1972, 457 F.2d 1091, 1095.

ciency. Indeed, we held Ellis v. Board of Public Instruc. of Orange County, 5 Cir. 1972, 465 F.2d 878, cert. denied, 1973, 410 U.S. 966, 93 S.Ct. 1438, 35 L.Ed.2d 700 *(Ellis II)*, that the school board was obliged to desegregate each all-black school remaining in Orange County under our prior holding.[11] *See also* Dandridge v. Jefferson Parish School Bd., 5 Cir. 1972, 456 F.2d 552, 554,[12] cert. denied, 1972, 409 U.S. 978, 93 S.Ct. 306, 34 L.Ed.2d 240.

The concentration of black students in virtually all-black schools contradicts the assertion that the School Board's plan for Montgomery establishes a unitary school system under these controlling standards. *Compare, e. g., Swann, supra; Davis, supra; Ellis II, supra;* Flax v. Potts, 5 Cir. 1972, 464 F.2d 865, 869, cert. denied, 1972, 409 U.S. 1007, 93 S.Ct. 433, 34 L.Ed.2d 299 (middle schools, high schools); Dandridge v. Jefferson Parish School Bd., 5 Cir. 1972, 456 F.2d 552, cert. denied, 1972, 409 U.S. 978, 93 S.Ct. 306, 34 L.Ed.2d 240; cases cited, note 9 *supra; see also* Keyes v. School Dist. No. 1, 1973, 413 U.S. 189, 199, n. 10, 93 S.Ct. 2686, 2692, 37 L.Ed.2d 548, 558. The teaching of *Swann* and *Keyes* is that no school which reflects vestigial discrimination through its virtually single-race student body can be omitted from a desegregation plan unless inclusion is unworkable; where desegregation is possible we can

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[11] We found the Orange County system could be unitary, however, although two elementary schools, to which 7% of the system's black elementary students were assigned, continued with 79% black enrollments, where 14% of the system's black students had employed the majority to minority transfer program.

[12] *Compare* Lee v. Macon County Bd. of Educ. (Anniston), 5 Cir. 1973, 483 F.2d 244 (post-*Swann*), *with* Lee v. Macon County Bd. of Educ. (Anniston), 5 Cir. 1970, 429 F.2d 1218 (pre-*Swann*). *But cf.* Lee v. Macon County Bd. of Educ. (Troy), 5 Cir. 1973, 475 F.2d 748 (apparently denying interim relief only).

tolerate no abandonment of some given portion of students locked into a uniracial educational experience.

In appraising a school board's plan we are, of course, attentive to conditions other than racial concentrations. I cannot agree, however, with the suggestion that compliance with the remaining five of the six requirements established in Green v. School Board of New Kent County, 1968, 391 U.S. 430, 435, 88 S.Ct. 1689, 1693, 20 L.Ed.2d 716, 722—"faculty, staff, transportation, extra-curricular activities and facilities"—can immunize the School Board's plan.[13] So to conclude would ignore that "[i]n *Green* the court spoke in terms of the whole system," *Ellis I*, 423 F.2d at 204, and would disregard the recognition that student assignment is the most important single aspect of a desegregated school system. Our cases have always required compliance with all six particulars.[14] The School Board additionally argues that the secondary schools in Montgomery County are desegregated, and points out that we have taken note of thorough integration at the secondary level, in some cases approving assignment plans which left some all-black primary schools. *See* Lee v. City of Troy Bd.

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[13] *See* 377 F.Supp. at 1138. I assume *arguendo* that the Board plan complies with the remaining five benchmarks enumerated in *Green*.

[14] *See, e.g., Ellis II, supra;* Valley v. Rapides, 5 Cir. 1970, 434 F.2d 144; Allen v. Board of Public Instruc. of Broward County, 5 Cir. 1970, 432 F.2d 362, cert. denied, 1971, 402 U.S. 952, 91 S.Ct. 1609, 1612, 29 L.Ed.2d 123; Pate v. Dade County School Bd., 5 Cir. 1970, 434 F.2d 1151, cert. denied, 1971, 402 U.S. 953, 91 S.Ct. 1613, 29 L.Ed.2d 123; Henry v. Clarksdale Mun. Sep. School Dist., 5 Cir. 1970, 433 F.2d 387; Bradley v. Board of Public Instruc. of Pinellas County, 5 Cir. 1970, 431 F.2d 1377, cert. denied, 1971, 402 U.S. 943, 91 S.Ct. 1608, 29 L.Ed.2d 111; City of Monroe v. Andrews, 5 Cir. 1970, 425 F.2d 1017. *See generally* Singleton v. Jackson Mun. Sup. School Dist., 5 Cir. (en banc) 1970, 419 F.2d 1211.

of Educ., 5 Cir. 1970, 432 F.2d 819, 822; Hightower v. West, 5 Cir. 1970, 430 F.2d 552, 555. This argument also fails here. Even assuming *arguendo* that the secondary schools in Montgomery County were fully integrated, we would as in the pre-*Swann* cases relied upon by the School Board, attach little weight to that consideration. Moreover, as it has become quite clear, "[T]his court has, with limited exceptions [not applicable here] disapproved of school board plans which exclude a certain age grouping from school desegregation." Arvizu v. Waco Indep. School Dist., 5 Cir. 1974, 495 F.2d 499, 503.[15] In the light of *Swann* and our developed case law, it is manifest that the progressive integration of Montgomery's high schools is no excuse for the continued failure to desegregate at the elementary level.[16]

In sum, a neighborhood school assignment plan may be adequate if it establishes a unitary school system; but such assignment is not "per se adequate." Davis v. Board of School Comm'rs of Mobile County, 1971, 402 U.S. at 37, 91 S.Ct. at 1292, 28 L.Ed.2d at 581. A review of the circumstances of the Montgomery County system, particularly

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[15] In some cases it may prove necessary to avoid transportation of school children of very tender age, *see generally Swann*, 402 U.S. at 31, 91 S.Ct. at 1283, 28 L.Ed.2d at 575; Cisneros v. Corpus Christi Indep. School Dist., 5 Cir. (en banc) 1972, 467 F.2d 142, 153, cert. denied, 1973, 413 U.S. 922, 93 S.Ct. 3052, 37 L.Ed.2d 1044. But such exceptions are carefully limited, *see, e.g.*, Flax v. Potts, 5 Cir., 1972, 464 F.2d 865, 869, cert. denied, 1972, 409 U.S. 1007, 93 S.Ct. 433, 34 L.Ed.2d 299; Lockett v. Board of Educ. of Muscogee County School Dist., 5 Cir. 1971, 447 F.2d 472, 473; *cf.* Lee v. Macon County Bd. of Educ., 5 Cir. 1973, 475 F.2d 748 (apparently denying interim relief only).

[16] In cases where racially identifiable primary schools cannot feasibly be eradicated, of course, a district court should endeavor particularly to insure that students from such schools will graduate to fully integrated schools.

the concentration of black elementary students in virtually all-black schools, reveals that the School Board plan approved by the district court was insufficient to achieve a unitary school system as required under *Green* and *Swann*. Such a plan can stand only if its lack of unitary status is not attributable to state action, or if no further remedy is workable.

B

Residential Patterns

The district court declined to require further desegregation of the remaining virtually all-black elementary schools in Montgomery County, in part because it considered the persistence of those schools to be "a result of residential patterns and not of the school board's action—either past or present." 377 F.Supp. at 1132. Because the district court's opinion offers no supporting discussion, it is unclear whether the district court believed that the present existence of virtually all-black schools could be laid in part to residential patterns established during the period of statutory school segregation yet not induced by that state action, or that the development of racially identifiable neighborhoods since the onset of efforts to integrate the schools had precipitated the virtually all-black schools.[17] In either event, I think the district court erred in its legal determination.

Aware that "[p]eople gravitate toward school facilities, just as schools are located in response to the needs of people," the Supreme Court has recognized that

[17] The record discloses that of the 11 elementary schools which retain a projected black population over 80% under the School Board's "neighborhood assignment" plan, 8 (all but Bellinger Hill, Davis, and Pintlala) had been black schools before 1970.

> [t]he location of schools may . . . influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.
>
> In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system.

Swann, 402 U.S. at 20, 21, 91 S.Ct. at 1278, 28 L.Ed.2d at 569.

Moreover,

> [A] connection between past segregative acts and present segregation may be present even when not apparent and . . . close examination is required before concluding that the connection does not exist. Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation.

Keyes, 413 U.S. 189, 211, 93 St.Ct. 2686, 2699, 37 L.Ed.2d 548, 565.

Accordingly, the *Swann* Court held that while

> the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that practices segregation by law [,] . . . in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one

> race, they have the burden of showing that such assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

Swann, 402 U.S. at 26, 91 S.Ct. at 1281, 28 L.Ed.2d at 572. The School Board may satisfy its burden "only by showing that its past segregative acts did not create or contribute to the current segregated condition of . . . [particular] schools." *Keyes,* 413 U.S. at 211, 93 S.Ct. at 2699, 37 L.Ed.2d at 565.

There is no evidence to support a conclusion that the existence of virtually all-black neighborhood elementary schools, so far as they derive from residential patterns etched before school desegregation, is innocent of past discriminatory action by the School Board. The opinion below lacks the detailed factual findings by the district court which should reflect the "close scrutiny" required under *Swann* and *Keyes,* and the record bears no evidence to support the conclusion that the link between past and present segregation has been severed. While there is much evidence of the residential separations between whites and blacks in Montgomery, which in some cases shows that those patterns are not new, evidence of this sort is insufficient to overcome the presumption established in *Swann* connecting the development of persistently segregated residential patterns with state-mandated school segregation. *See also* Dandridge v. Jefferson Parish School Bd., 5 Cir. 1972, 456 F.2d 552, cert. denied, 1972, 409 U.S. 978, 93 S.Ct. 306, 34 L.Ed. 240.

These principles establish equally well that racial segregation in the Montgomery County elementary schools can-

not be excused on the ground that segregated residential patterns of some neighborhoods from which the one-race neighborhood schools draw have crystallized as the result of population shifts by private residents since the court's initiation of school desegregation. Such an argument has previously been rejected by this Court.[18] To be sure, the Supreme Court has made clear that after a school system attains unitary status,

> the communities served by such [a system may not] remain demographically stable [;] . . . in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.

Swann, 402 U.S. at 31-32, 91 S.Ct. at 1283, 28 L.Ed.2d at 575.

But in Montgomery a unitary system has never been achieved, for "[t]he vestiges of state-imposed segregation [have not] been eliminated from the assignment of elementary school students," Flax v. Potts, 5 Cir. 1972, 464 F.2d 865, 868, cert. denied, 1972, 409 U.S. 1007, 93 S.Ct. 433, 34 L.Ed.2d 299, as required under *Swann.*[19]

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[18] *See* Flax v. Potts, 5 Cir. 1972, 464 F.2d 865, 868, cert. denied, 1972, 409 U.S. 1007, 93 S.Ct. 433, 34 L.Ed.2d 299; *cf.* Boyd v. Pointe Coupee Parish School Bd., 5 Cir. 1974, 505 F.2d 632; Hereford v. Huntsville Bd. of Educ., 5 Cir. 1974, 504 F.2d 857; Adams v. Rankin, 5 Cir. 1973, 485 F.2d 324.

[19] *Cf.* Ellis v. Board of Public Instruc. of Orange County, 5 Cir. 1972, 465 F.2d 878, 879-80, cert. denied, 1973, 410 U.S. 966,

C

Remedy

Because the School Board's proposed elementary school plan falls short of achieving a unitary system, and this failing cannot be attributed solely to private action, the district court should have ordered an appropriate alternative plan. As we have said before *Swann* and reiterated after, "[i]n the conversion from dual school systems based on race to unitary school systems, the continued existence of all-black or virtually all-black schools is unacceptable where reasonable alternatives exist." [20]

The district court discarded the plans proposed by the plaintiffs and plaintiffs-intervenors, after determining that they aimed at balancing black/white student populations on abstract ratios, rather than simply creating a unitary assignment plan. Although the plaintiffs and plaintiffs-intervenors protest that their use of ratios as indicators of residually discriminatory school assignments remained

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93 S.Ct. 1438, 35 L.Ed.2d 700 (*Ellis II*); Dandridge v. Jefferson Parish School Bd., 5 Cir., 1972, 456 F.2d 552, 554, cert. denied, 1972, 409 U.S. 978, 93 S.Ct. 306, 34 L.Ed.2d 240. Moreover, there is even some indication of Montgomery County School Board action since the onset of court-ordered desegregation which may tend to perpetuate the dual system. As the district court found at a prior stage in this litigation, the location and extent of construction and expansion of elementary and secondary schools in Montgomery County have "been designed to perpetuate, and have the effect of perpetuating, the dual school system." Carr. v. Montgomery County Bd. of Educ., M.D.Ala. 1968, 289 F.Supp. 647, 652. *See generally, Swann*, 402 U.S. at 18-21, 91 S.Ct. at 1277, 28 L.Ed.2d at 568-70; *cf. Keyes*, 413 U.S. at 201-05, 93 S.Ct. at 2694-2695, 37 L.Ed.2d at 559-61.

[20] Allen v. Board of Educ. of Broward County, 5 Cir. 1970, 432 F.2d 362, 367, cert. denied, 1971, 402 U.S. 952, 91 S.Ct. 1609, 1612, 29 L.Ed.2d 123, *quoted in* Boykins v. Fairfield Bd. of Educ., 5 Cir. 1972, 457 F.2d 1091, 1095.

within the bounds approved by the Supreme Court in *Swann*, 402 U.S. at 22-25, 91 S.Ct. at 1279-1280, 28 L.Ed.2d at 570-72, I would not hold that the district court abused its discretion in choosing not to follow those plans. Nevertheless, the elimination of those proposals did not relieve the district court of its duty to exercise its "broad power to fashion a remedy that will assure a unitary school system," and to "make every effort to achieve the greatest possible degree of actual desegregation and . . . [eliminate] one-race schools." *Swann*, 404 U.S. at 16, 26, 91 S.Ct. at 1281, 28 L.Ed.2d at 567, 572. Upon determining that none of the alternatives presented was satisfactory, the district court should have held further proceedings to forge a workable and effective plan. *See* Cisneros v. Corpus Christi Indep. School Dist., 5 Cir. (en banc) 1972, 467 F.2d 142, 152, cert. denied, 1973, 413 U.S. 922, 93 S.Ct. 3052, 37 L.Ed.2d 1044. The district court should support its failure so to proceed only by a conclusion that no further desegregation of the elementary school population was workable on any plan.

The School Board has consistently maintained that no workable means exists for increasing desegregation in the elementary schools, and the district court agreed, finding "that the remaining predominantly black schools cannot be effectively desegregated in 'a practical and workable manner' and that the School Board plan achieved 'the greatest possible degree of actual desegregation, taking into account the 'practicalities of the situation.'" 377 F. Supp. at 1135. These conclusions are drawn on insufficient or improper factual considerations, however, and are thus inadequate as a matter of law.

The district court reasoned that any further elementary school desegregation would require cross-busing of black and white students which "would not, under the circum-

stances of this case, accomplish any realistically stable desegregation." 377 F.Supp. at 1132.[21] The opinion carries no discussion or subsidiary findings to explain its concern with the stability of desegregation. Apparently the district court was persuaded by the School Board's attempt[22] to demonstrate that busing of white children into black neighborhoods to attend traditionally black schools would in many cases be met with withdrawal of white students from those schools. But it is well settled that the threat of "white flight," however likely, cannot validate an otherwise insufficient desegregation remedy.[23] To the extent that it considered white flight as a factor requiring the moderation of desegregation otherwise to be ordered, the district court was in error.

The opinion below does not sufficiently explicate the remaining factors (other than stability) that the district court appraised and the reasoning it followed in determining that no further elementary school desegregation was feasible beyond that suggested by the School Board. The district court simply specified the totals of children to be reassigned and the number of students to be newly

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[21] The district court also forecast that the plans of the plaintiffs and plaintiffs-intervenors would provide only "an extremely unstable desegregated system." 377 F.Supp. at 1131.

[22] *See, e.g.*, Transcript, April 24, 1974, at 240.

[23] *See, e.g.*, Monroe v. Board of Commissioners of City of Jackson, 1968, 391 U.S. 450, 459, 88 S.Ct. 1700, 1704, 20 L.Ed.2d 733, 739; Lee v. Macon County Bd. of Educ. (Marengo), 5 Cir. 1972, 465 F.2d 369; United States v. Hinds County School Bd., 5 Cir. 1969, 417 F.2d 852, 858, cert. denied, 1970, 396 U.S. 1032, 90 S.Ct. 612, 24 L.Ed.2d 531; Lee v. Macon County Bd. of Educ. (Pickens), M.D.Ala. (3 judge) 1970, 317 F.Supp. 95, 98-99. *Cf., e.g.*, Boyd v. Pointe Coupee Parish School Bd., 5 Cir. 1974, 505 F.2d 632; Hereford v. Huntsville Bd. of Educ., 5 Cir. 1974, 504 F.2d 857; Adams v. Rankin, 5 Cir. 1973, 485 F.2d 324.

bused under the plaintiffs' and plaintiffs-intervenors' plans; observed without any specific findings that busing would involve a substantial increase in the time and distance that students would have to travel to school; and then concluded that the plaintiffs'—but not the plaintiffs-intervenors'—plan "would be disruptive to the educational processes and would place an excessive and unnecessarily heavy administrative burden on the school system." These findings are an inadequate foundation on which the rest either a determination of the unworkability of the proposed plans or a conclusion that no improvement of the Board's solution could be obtained. Nor does the face of the record reveal any inherent obstacle to the progress of all further desegregation in Montgomery through the instruments of zoning, pairing, and busing. Each of these tools has been approved in *Swann*, 402 U.S. at 27-29, 91 S.Ct. at 1281-82, 28 L.Ed.2d at 573-74, and Cisneros v. Corpus Christi Indep. School Dist., 5 Cir. (en banc) 1972, 467 F.2d 142, 152-53, cert. denied, 1973, 413 U.S. 922, 93 S.Ct. 3052, 37 L.Ed.2d 1044, and repeatedly utilized in this circuit.

We have, where necessary, required both rezoning[24] and pairing or clustering;[25] and while pairing may not be the

[24] *See, e.g.*, Conley v. Lake Charles School Bd., 5 Cir. 1970, 434 F.2d 35, 39-41; Valley v. Rapides Parish School Bd., 5 Cir. 1970, 434 F.2d 144, 147; Pate v. Dade County School Bd., 5 Cir. 1970, 434 F.2d 1151, 1158, cert. denied, 1971, 402 U.S. 953, 91 S.Ct. 1613, 29 L.Ed.2d 123; Bradley v. Board of Public Instruc. of Pinellas County, 5 Cir. 1970, 431 F.2d 1377, 1381-83, cert. denied, 1971, 402 U.S. 943, 91 S.Ct. 1608, 29 L.Ed.2d 111. *See also* Wright v. Board of Public Instruc. of Alachua County, 5 Cir. 1970, 431 F.2d 1200.

[25] *See, e.g.*, Weaver v. Board of Public Instruc. of Brevard County, 5 Cir. 1972, 467 F.2d 473, cert. denied, 1973, 410 U.S. 982, 93 S.Ct. 1498, 36 L.Ed.2d 177; Flax v. Potts, 5 Cir. 1972, 464 F.2d 865, 868-69, cert. denied, 1972, 409 U.S. 1007, 93 S.Ct. 433, 34 L.Ed.2d 299; Ross v. Eckels, 5 Cir. 1970, 434 F.2d 1140,

remedy of first resort,[26] we have said and repeated that "where all-black or virtually all-black schools remain under a zoning plan, but it is practicable to desegregate some or all of the black schools by using the tool of pairing, the tool must be used."[27] The record, insofar as it reveals the administrative practicalities associated with rezoning and pairing or clustering, does not appear to preclude the imposition of all measures beyond those desired by the School Board. The record fails to indicate in any way how Montgomery's situation differs from the conditions existing in any of the many other school districts in which we have specified that these measures be employed. Indeed, examination of the record suggests the feasibility of their utilization in several instances.[28] Accordingly, I would hold

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1148, cert. denied, 1971, 402 U.S. 953, 91 S.Ct. 1614, 29 L.Ed.2d 123; Henry v. Clarksdale Mun. Sep. School Dist., 5 Cir. 1970, 433 F.2d 387, 394-95; Allen v. Board of Public Instruc. of Broward County, 5 Cir. 1970, 432 F.2d 362, 367-71 (citing additional cases), cert. denied, 1971, 402 U.S. 952, 91 S.Ct. 1609, 1612, 29 L.Ed.2d 123. *See also* Miller v. Board of Educ. of Gadsden, 5 Cir. 1973, 482 F.2d 1234; Boykins v. Fairfield Bd. of Educ., 5 Cir. 1972, 457 F.2d 1091, 1095; Andrews v. City of Monroe, 5 Cir. 1970, 425 F.2d 1017, 1021.

[26] Allen v. Board of Public Instruc. of Broward County, 5 Cir. 1970, 432 F.2d 362, 367, cert. denied, 1971, 402 U.S. 952, 91 S.Ct. 1609, 29 L.Ed.2d 123, *quoted in* Flax v. Potts, 5 Cir. 1972, 464 F.2d 865, 868, cert. denied 1972, 409 U.S. 1007, 93 S.Ct. 433, 34 L.Ed.2d 299, and Boykins v. Fairfield Board of Educ., 5 Cir. 1972, 457 F.2d 1091, 1095.

[27] *See* Cisneros v. Corpus Christi Indep. School Dist., 5 Cir. (en banc) 1972, 467 F.2d 142, 153, cert. denied, 1973, 413 U.S. 922, 93 S.Ct. 3052, 37 L.Ed.2d 1044; Conley v. Lake Charles School Bd., 5 Cir. 1970, 434 F.2d 35, 39.

[28] In regard to the initial administrative difficulties associated with re-zoning and pairing, we emphasize "[t]he fact that a temporary, albeit difficult, burden may be placed on the School Board in the initial administration of the plan . . . does not justify in these circumstances the continuation of a less than

that the district court erred in approving the School Board plan, and remand the cause for implementation of a constitutionally sufficient plan.

The district court entered no specific findings regarding the extent in time or miles[29] of additional busing required to implement any of the desegregation plans before it, nor did it express any conclusions as to whether "the time or distance of travel [under any possible plan was] so great as to either risk the health of the children or significantly impinge on the educational process." *Swann*, 402 U.S. at 30-31, 91 S.Ct. at 1283, 28 L.Ed.2d at 575. Certainly it is clear that the School Board plan employs less than the maximum busing possible, since it anticipates a significant reduction in elementary school student busing in the year of implementation. Accordingly, I would direct that in analyzing remedies for desegregation of the Montgomery schools on remand, the district court should consider the implementation of additional busing as necessary to accomplish new zoning, pairing, or clustering.[30]

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unitary school system and the resulting denial of an equal educational opportunity to a certain segment of the [County] children." Dandridge v. Jefferson Parish School Bd., E.D.La. 1971, 332 F.Supp. 590, 592, stay denied, 1971, 404 U.S. 1219, 92 S.Ct. 18, 19, 30 L.Ed.2d 23, 24 (Marshall, J., in chambers; quoting cited language with approval), aff'd, 5 Cir. 1972, 456 F.2d 552, cert. denied, 1972, 409 U.S. 978, 93 S.Ct. 306, 34 L.Ed.2d 240.

[29] *See* Cisneros v. Corpus Christi Indep. School Dist., 5 Cir. 1972, 467 F.2d 142, 153, cert. denied, 1973, 413 U.S. 922, 93 S.Ct. 3052, 37 L.Ed.2d 1044.

[30] Significantly, the extent—in terms of the number of pupils involved, and apparently the length of the trips—of additional elementary student busing envisioned in connection with the plaintiffs'-intervenors' plan very closely parallels the increase in elementary school busing under the desegregation plan implemented in *Swann*, as reflected in the opinions in the Supreme Court, 402 U.S. at 29-31, 91 S.Ct. at 1282-1283, 28 L.Ed.2d at 574-75, and the Fourth Circuit, 1970, 431 F.2d 138, 144-47.

To summarize, I would hold that the district court erred in adopting the School Board plan, because that plan falls short of the constitutional mark, and because there is no indication of the unworkability of a Constitutional remedy. I do not believe the district court's result can be upheld on any of the arguments advanced, whether independently or cumulatively considered. If there be no other way to desegregate, the tools of pairing and clustering must be used to relieve the barricaded and beleaguered blacks from their school garrisons. These mixing mechanisms have received judicial blessing, and they must be employed unless manifestly unusable for constitutional reasons. Other innovations may be considered. Nothing to achieve the constitutional mandate to desegregate can be avoided because of whimsy, white flight and fright, inconvenience, annoyance or any other actual or conjured excuse. Desegregation of education is a constitutional necessity and not an optional luxury, and bland generalities will not suffice to justify segregated schools.

I would be unwilling to require the immediate implementation of any of the alternative elementary school plans presented, however, in light of the district court's determination that the plans of the plaintiffs and plaintiffs-intervenors were generated to achieve racial ratios beyond and in contravention of the mandate of *Swann*, in light of the state of the record, and in light of the opportunity remaining for the district court to refine and meld the various plans before it.[31] Rather I would remand the case to the district court for further proceedings to develop a proper plan. We have in the past required specific and detailed

[31] *Cf.* Adams v. Rankin County Bd. of Educ., 5 Cir. 1973, 485 F.2d 324, 326; Andrews v. City of Monroe, 5 Cir., 1970, 425 F.2d 1017, 1021.

findings to accompany the district court's selection of a desegregation remedy that promises to be less effective than alternative plans for establishing a unitary school system.[32] This requirement is meant to secure to the reviewing court the full advantages of the factual appraisals and perspective of the particularly well-situated trial court, in order to maximize the benefits of the district court's informed discretion. *Cf.* Brown v. Board of Educ. of Topeka, 1955, 349 U.S. 294, 299-300, 75 S.Ct. 753, 755-756, 99 L.Ed. 1083, 1105-06 (*Brown II*). Thus I would direct that, if the district court should approve on remand a plan less than fully effective in establishing a unitary school system in Montgomery County, it must support its conclusion with precise and detailed findings of fact, keeping in mind *Swann's* heavy burden upon school officials to legitimate any less than thorough desegregation plan on grounds of unworkability:[33]

> All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but

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[32] *See, e.g.*, Adams v. Rankin County Bd. of Educ., 5 Cir. 1973, 485 F.2d 324, 326; Boykins v. Fairfield Bd. of Educ., 5 Cir. 1972, 457 F.2d 1091, 1097; Andrews v. City of Monroe, 5 Cir. 1970, 425 F.2d 1017, 1021; *cf. also*, Winston-Salem/Forsyth County Bd. of Educ., 1971, 404 U.S. 1221, 1226-27, 92 S.Ct. 1236, 1239, 31 L.Ed. 2d 441, 446 (Burger, C. J., in chambers).

[33] *See also* Green v. School Bd. of New Kent County, 1968, 391 U.S. 430, 439, 88 S.Ct. 1689, 1695, 20 L.Ed.2d 716, 724.

> all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school system.

402 U.S. at 28, 91 S.Ct. at 1282, 28 L.Ed.2d at 573. Many practicalities affect the judgment and aims of school authorities in pursuing their daily occupation of maintaining a pragmatic educational system. But when the constitutionally mandated establishment of a unitary school system rests in the balance, workaday practicalities are no longer determinative factors. The conservation of such daily efficiencies may have been a considered objective in the days of Plessy v. Ferguson, 1896, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256, but Brown v. Board of Educ. of Topeka, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (*Brown I*), has taken us down a new road. *Brown* and its post-adolescent progeny have imposed upon school authorities and courts an affirmative duty to see that such stumbling blocks in the path of desegregation are relegated to a footnote in history. As we observed in a prior *Montgomery* case,[34] "This obligation is unremitting, and there can be no abdication, no matter how temporary." A school board's plan may have any number of advantages when appraised in ordinary perspective, but these give way where they impede the progress of desegregation; convenience as well as custom must bend to constitutional prescription.

Given my resolution of this aspect of the attack on the School Board's plan for the elementary grades, I would find it unnecessary to consider at this time whether that plan imposes a discriminatorily harsh burden on the black students.

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[34] Carr v. Montgomery County Bd. of Educ., 5 Cir. 1970, 429 F.2d 382, 386.

Opinion dated April 11, 1975

III

Junior High School Plan

The junior high school student assignment plan in effect in the Spring of 1974 left over half of the black students in 7 junior high schools which were over 85% black. The School Board plan, as implemented by the district court, proposed to reduce this concentration through rezoning, peripheral reassignments, and the elimination of three black schools; the district court projected that McIntyre Junior High, enrolling 792 of the County's black junior high students (18%) would remain the only junior high facility[35] more than 80% black under the School Board plan.

Both the plaintiffs and plaintiffs-intervenors submitted alternative plans for desegregation at the junior high level. The plaintiffs proposed to modify the basic School Board plan through additional busing to achieve a closer racial balance at McIntyre and two other junior high schools left substantially black under the Board plan, Bellingrath and Baldwin. The plaintiffs-intervenors projected a 65% black student body at McIntyre, and a less than 60% black enrollment at each of 8 other junior high schools within the

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[35] The district court's opinion, following the style of the School Board plan, treats the some 252 (233 black, 19 white) junior high school students in attendance at the Montgomery County High facility as senior high school students. The apparent premise to this treatment is that "[i]t is conceded by all parties that Montgomery County High School . . . cannot be effectively desegregated because of its isolation." 377 F.Supp. at 1138, n. 37. This conclusion is not contested here, although the plaintiffs-intervenors' plan did propose to reduce the junior high class at Montgomery County High from 92% to 82% black. My figures follow the style of the district court.

City, under a plan of new elongated but continuous strip zones, with transportation to be provided within each zone where necessary. In adopting the School Board plan for the junior high schools, the district court dismissed these alternative proposals as too inflexibly wedded to abstract racial balancing, and suggested that they were unfeasible. Emphasizing the isolation of McIntyre as the only virtually all-black junior high remaining under the School Board plan, the district court held that "under the circumstances that exist in the Montgomery school system" no further requirement of desegregation could be imposed upon the County. 377 F.Supp. at 1139.[36]

Unfortunately, the data revealing the actual desegregation at the junior high schools accomplished under the School Board plan, as of September 15, 1974, show that "the circumstances" have changed.[37] False to predictions,

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[36] The district court found that the plaintiffs' proposed plan would require reassignment of 36% of the junior high student body, and additional transportation of about 17%; the plaintiffs-intervenors' plan was forecast to require reassignment of 50-60% and additional busing of some 20%. (The plaintiffs-intervenors assert that the opinion below is clearly erroneous in its computation of busing required under their junior high plan; I would not pass on the issue at this time.) The district court did not enter any findings regarding the proportion of students reassigned, projected to be reassigned, or newly transported under the School Board plan. Nor does the opinion below reveal any specific conclusions regarding the significance of the burdens in reassigning or transporting additional students, except that the McIntyre facility "is impossible to effectively desegregate in a stable and workable manner." 377 F.Supp. at 1132.

[37] *See* Appendix B. The actual enrollment figures as of September 15, 1974, are taken from the School Board's October 1, 1974, report to the District Court, per that court's order. These figures are not challenged by any other parties. *See* Davis v. Board of School Comm'rs of Mobile County, 1971, 402 U.S. 33, 37, 91 S.Ct. 1289, 1291, 28 L.Ed.2d 577, 580. This data is utilized in Appendices A, B, and C.

the student body at McIntyre Junior High is 98% black, Baldwin is 85% black, and Bellingrath is, as I compute it,[38] 81% black. Thus, more than a quarter of the black junior high school students in the City[39] are locked in schools 85% or more black, and nearly 40% in schools 80% or more black.

I would not pass now on the academic question of the acceptability of the School Board plan as proposed and implemented by the district court. It is now clear that the School Board plan has been unsuccessful, *as implemented*, in accomplishing desegregation at the junior high level,[40] and there is no indication on the record that the present circumstances are beyond remedy. As the previous discussion of the elementary school plan should make clear, the School Board plan for the junior high schools cannot

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[38] The actual enrollment figures for Bellingrath, as of September 15, 1974, are estimations. According to the district court's opinion, projected attendance at the Bellingrath facility was to be 215 (115 black, 100 white) at the elementary level and 1049 (659 black, 390 white) at the junior high level. Actual enrollment as of September 15, 1974, listed by the School Board is a combined total of 911 (681 black, 230 white) students; no breakdown is given as to grade levels.

The total actual attendance at Bellingrath is considerably lower than the total projected attendance. The net over-projection is 93 black students (12% of projection), and 260 white students (53% of projection). In estimating actual attendance, I have, conservatively, attributed the total decrease to the junior high level, where the enrollment was projected to be 62% black, and for which the zone was to be significantly shifted for 1974-75. I would, of course, direct that on remand the district court proceed to determine the actual enrollment figures with certainty.

[39] These percentages do not include the junior high students at the Montgomery County Senior High facility. *See* note 35 *infra*.

[40] *Cf., e.g.*, Boyd v. Pointe Coupee Parish School, 5 Cir. 1974, 505 F.2d 632; Hereford v. Huntsville Bd. of Educ., 5 Cir. 1974, 504 F.2d 857; Adams v. Rankin County Bd. of Educ., 5 Cir. 1973, 485 F.2d 324, 325-26.

stand as it appears, unless improvement is unworkable. The record does not suggest what remedial plan might be employed at this stage. I would leave that difficulty for resolution by the district court, following whatever further proceedings it might find to be necessary. I would emphasize again, however, that the district court's order should be accompanied with supporting findings and conclusions of sufficient precision and detail to fully apprise a reviewing court of its reasons and understanding.

IV

Conclusion

We deal here with a school system whose roots were segregated by law. There is no indication that those roots have withered away, and that the racial separation in the present system is anything but the fruit of a tainted crop. The School Board still plans to cultivate its gardens separately; and it does not promise ever to integrate in any future season. Rather, its plan guarantees perennial one-race educational experiences for over a third of the black students within its elementary and junior high schools. Desegregation is not impossible in Montgomery. It might be uncomfortable, expensive, disturbing, or even disconcerting. But these words are not amendments to the Fourteenth Amendment's commands. Much progress has been made in Montgomery school desegregation, but medals earned for past performance cannot justify contemporary failure. I am confident that our respected, scholarly, and courageous trial judge did not hesitate to apply the law correctly as he saw it to the facts before him in Montgomery. I firmly believe, however, that that view of the

law is erroneous and in conflict with previous decisions of the Court and the Supreme Court of the United States.

I would reverse the order of the district court insofar as it adopts and implements the School Board plans for elementary and junior high schools in Montgomery County, and remand the cause for such further proceedings as would be necessary to bring Montgomery County to a unitary system. In order to permit the district court to reconsider its award of costs against the plaintiffs and plaintiffs-intervenors in light of further proceedings, I would vacate the judgment awarding costs in favor of the School Board.

Opinion dated April 11, 1975

APPENDIX A

Adoption of the School Board plan produces the following profiles of the elementary school student bodies:

School	Normal Capacity	Projected Enrollment			Actual Enrollment 9/15/74[a]		
		Black	White	% Black	Black	White	% Black
Bear	630	186	505	27%	185	407	31%
Bellinger Hill	300	186	43	81%	211	35	86%
Bellingrath	1,230[b]	115	100	53%	115[c]	100[c]	53%
B. T. Washington	420	255	4	98%	232	5	98%
Capitol Hgts.	570	119	192	38%	112	178	39%
Carver	780	421	2	99%	411	5	99%
Catoma	240	63	154	29%	54	153	26%
Chisolm	810	326	555	37%	376	505	43%
Crump	990	263	703	27%	246	745	25%
Daisy Lawrence	720	445	7	98%	403	8	98%
Dalraida	630	153	423	26%	143	421	25%
Dannelly	780	236	484	32%	254	512	33%
Davis	630	615	91	87%	637	45	93%
Dunbar	660	340	51	87%	328	34	91%
Fews	720	640	3	99%	641	3	100%
Flowers	780	169	573	23%	170	533	24%
Floyd	1,350[b]	148	319	32%	135[d]	275[d]	33%
Forest Ave.	480	172	262	40%	160	283	36%
Harrison	750	184	427	30%	255	357	42%
Hayneville Rd.	1,200	669	30	95%	705	21	97%
Head	690	148	415	26%	111	339	25%
Highland Ave.	390	115	272	30%	118	237	33%
Highland Gardens	1,020	335	551	38%	310	513	38%
Johnson	660	175	550	24%	168	527	24%
Loveless	1,140	902	5	99%	876	6	99%
MacMillan	390	205	109	65%	195	75	72%
Morningview	600	134	486	22%	110	427	20%
Paterson	810	566	34	94%	550	36	94%
Peterson	600	175	299	37%	149	322	32%
Pintlala	270	204	16	93%	196	4	98%
Southlawn	600	223	492	31%	260	427	38%
Eastern By-Pass	---	149	589	20%	149[e]	589[e]	20%
Vaughan Rd.	750	183	409	32%	199	519	27%
Total		9,224	9,160	50%	9,164	8,676	51%

Opinion dated April 11, 1975

APPENDIX B

Adoption of the School Board plan produces the following profiles of the junior high school student bodies:

School	Normal Capacity	Projected Enrollment Black	Projected Enrollment White	Projected Enrollment % Black	Actual Enrollment 9/15/74 [a] Black	Actual Enrollment 9/15/74 [a] White	Actual Enrollment 9/15/74 [a] % Black
Baldwin	780	290	107	73%	275	48	85%
Bellingrath	1,230 [b]	659	390	62%	566 [c]	130 [c]	81%
Capt. Hgts.	1,200	442	730	38%	345	742	32%
Carver	660	350	545	39%	354	538	40%
Cloverdale	1,170	437	875	33%	476	891	35%
Floyd	1,350 [b]	288	541	35%	264 [d]	467 [d]	36%
G. Washington	1,290	357	782	31%	409	904	31%
Goodwyn	1,500	540	1,031	34%	564	917	38%
Houston Hill	570	210	383	35%	248	307	45%
McIntyre	1,500	792	14	98%	881	15	98%
Montgomery Cty High [f]	—	—	—	—	—	—	—
Total		4,365	5,398	45%	4,382	4,959	47%

APPENDIX C

Adoption of the School Board plan produces the following profiles of the senior high school student bodies:

School	Normal Capacity	Projected Enrollment Black	Projected Enrollment White	Projected Enrollment % Black	Actual Enrollment 9/15/74 [a] Black	Actual Enrollment 9/15/74 [a] White	Actual Enrollment 9/15/74 [a] % Black
Carver Sr.	1,100	439	660	39%	610	673	48%
Jeff. Davis Sr.	2,100	868	1,426	38%	857	1,443	37%
Lanier Sr.	2,250	817	1,068	43%	677	801	46%
Lee Sr.	2,300	929	1,560	37%	815	1,650	33%
Montgomery Cty High [f]	570	399	63	86%	390	57	87%
Total		3,452	4,777	42%	3,349	4,630	42%

Footnotes to Appendices

[a] See note 37.

[b] These figures represent normal capacity for combined elementary and junior high grades.

[c] Estimated figures. For their computation see note 38.

[d] Estimated figures. According to the district court's opinion projected attendance at the Floyd facility was to be 467 (148 black, 319 white) at the elementary level, and 829 (288 black, 541 white) at the junior high level. Actual enrollment listed by the School Board is a combined total of 1141 (399 black, 742 white) students; no break-down is given as to grade levels. For sake of simplicity, in estimating actual enrollment I have simply reduced the projected enrollments of students at both levels proportionally, according to projected and actual enrollments, by race. I would, of course, direct that on remand the district court should proceed to determine the actual enrollment figures with certainty.

[e] Projected figures. No actual figures given.

[f] See note 37.

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ARLAM CARR, JR., a minor by Arlam Carr and Johnnie Carr, etc., *et al.*,

Plaintiffs-Appellants,

NATIONAL EDUCATION ASSOCIATION, INC.,

Intervenor,

PENELOPE ANNE JENKINS, ET AL.,

Intervenors-Appellants,

v.

MONTGOMERY COUNTY BOARD OF EDUCATION, ET AL., ETC.,

Defendants-Appellees,

UNITED STATES OF AMERICA,

Amicus Curiae.

No. 74-2633.

United States Court of Appeals,
Fifth Circuit.

June 27, 1975.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is denied and the Court having been polled at the request of one of the members of the

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Court and a majority of the Circuit Judges who are in regular active service and not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also denied.

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY and GEE, Circuit Judges.

GOLDBERG, Circuit Judge, with whom BROWN, Chief Judge and WISDOM and THORNBERRY, Circuit Judges, join (dissenting):

I respectfully dissent from the order denying the petition for rehearing and petition for rehearing en banc, for the reason stated in my dissenting opinion. 511 F.2d 1374.